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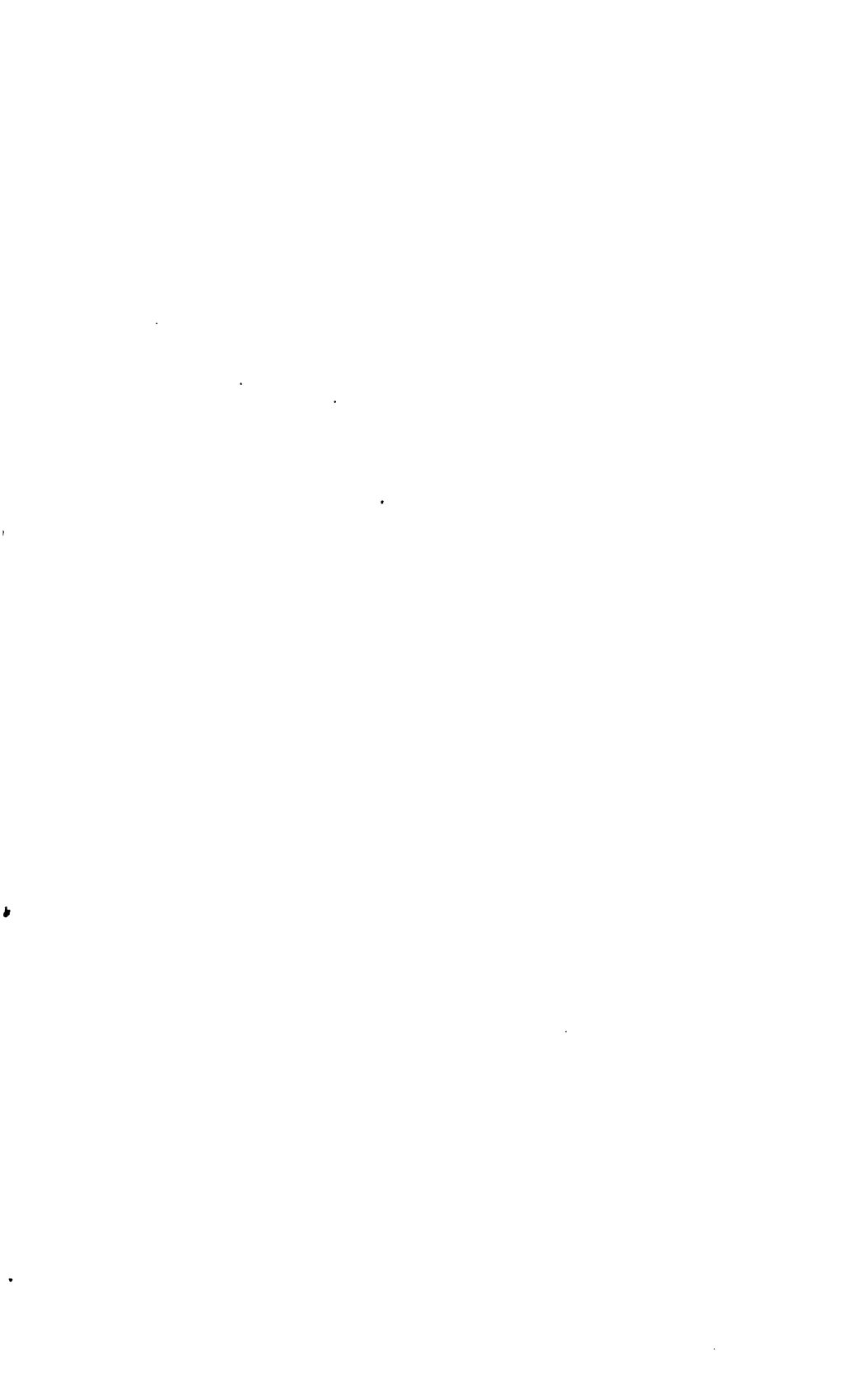
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REPORTS ^{c †}
OF
Cases in Law and Equity
DETERMINED IN THE
S U P R E M E C O U R T
OF THE
STATE OF NEW YORK.

BY OLIVER L. BARBOUR, LL D.

VOL. XLI.

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DURING THE YEAR 1864.

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" 2. WILLIAM H. LEONARD.†
" 3. GEORGE G. BARNARD.
" 4. THOMAS W. CLERKE.
" 5. JOSIAH SUTHERLAND.

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- " 1. JOHN W. BROWN.†
" 2. WILLIAM W. SCRUGHAM.
" 3. JOHN A. LOTT.
" 4. JOSEPH F. BARNARD.

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- " 1. HENRY HOGEBOOM.*
" 2. RUFUS W. PECKHAM.†
" 3. THEODORE MILLER.
" 4. CHARLES R. INGALLS.

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- " 1. PLATT POTTER.†
" 2. AUGUSTUS BOCKES.
" 3. AMAZIAH B. JAMES.
" 4. ENOCH H. ROSEKRANS.

JUSTICES OF THE SUPREME COURT.

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" 3. WILLIAM J. BACON.
" 4. HENRY A. FOSTER.

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- " 1. WILLIAM W. CAMPBELL.†
" 2. JOHN M. PARKER.
" 3. CHARLES MASON.
" 4. RANSOM BALCOM.

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- " 1. THOMAS A. JOHNSON.*.
" 2. JAMES C. SMITH.†
" 3. HENRY WELLES.
" 4. ERASMUS DARWIN SMITH.

EIGHTH JUDICIAL DISTRICT.

- " 1. NOAH DAVIS.†
" 2. MARTIN GROVER.
" 3. RICHARD P. MARVIN.
" 4. CHARLES DANIELS.

JOHN COCHRANE, *Attorney General.*

* Sitting in the Court of Appeals.

† Presiding Justice.

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CASES
IN
Law and Equity
IN THE
SUPREME COURT
OF THE
STATE OF NEW YORK.

**THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY *vs.*
THE CLEVELAND, COLUMBUS AND CINCINNATI RAIL ROAD
COMPANY.**

Bonds, issued by a rail road company, whether under its corporate seal or not, payable to A. B., or the holder thereof, are negotiable, and will pass by delivery.

If interest coupons, annexed to a bond of this description, are not paid, when due, interest should be allowed, by way of damages for non-payment.

Where a corporation indorses upon an interest-warrant, or coupon, issued by another company, a guaranty of payment, "for value received," it is not to be deemed an accommodation indorser or guarantor. The words "value received" import a sufficient consideration.

An arrangement between several connecting rail road companies, entered into for the purpose of securing a uniform gauge of the several roads, and thus increasing the business and profits of each, forms a sufficient consideration for a guaranty by one of the corporations, of the payment of the coupons issued by another.

Where the general rail road laws of Ohio declared that any rail road company might, by means of subscription to the capital stock of any other company,

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or otherwise, aid such company in the construction of its rail road, for the purpose of forming a connection between said last mentioned road and the road owned by the company furnishing such aid ; and authorized any two or more rail road companies whose lines were connected, to enter into any arrangement for their common benefit ; *Held* that these provisions gave the power to companies whose lines of road were connected to enter into an arrangement with each other for the purpose of securing a uniform gauge of the connecting roads, and to make it part of such arrangement that one or more of the companies should guaranty the payment of the interest coupons issued by another.

If the guarantors, under such circumstances, have the general power to make the guaranty, it is immaterial as between third parties without notice and such guarantors, whether their acts are authorized or ratified by a vote of the stockholders, in accordance with the provisos of the general rail road statutes of Ohio ; those provisos being intended for the protection of the shareholders, and relating rather to the mode or manner of the execution of the power.

Holders of the coupons guarantied have a right to presume that the guarantors have done their duty and have proceeded regularly, in the execution of the power.

Third parties dealing with a corporation are bound to know the law ; that is, they are bound to take notice of the extent of its powers ; but they have a right to assume, in the absence of any thing suggesting inquiry, that it has proceeded regularly in the execution of its powers. *Per* SUTHERLAND, P. J.

A guaranty of the payment of interest-warrants annexed to a bond may be valid, though the bond be void.

Where bonds and coupons, though executed in the state of Ohio, are payable in the state of New York, the cause of action arises here, and this court has jurisdiction, though both parties are foreign corporations.

THIS action was brought against the defendants to recover the amount due upon one hundred and forty coupons attached to twenty bonds issued by the Columbus, Piqua and Indiana Rail Road Company, the payment of which was guarantied by the defendants. The bonds were for \$1000 each, dated April 1, 1854, and were made payable to Elias Fassett, or to the holder thereof, at the office of the Ohio Life Insurance and Trust Company, Wall street, in the city of New York, on the first day of April, 1869, with interest at the rate of seven per cent per annum, semi-annually on the first days of October and April, on the presentation of the annexed interest warrants, at said office. The bonds were

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signed by the president of the rail road company. The coupons, or interest-warrants annexed to the bonds, were in the following form, varied in each case as to the time of payment :

“ The Columbus, Piqua and Indiana Rail Road Company will pay to the holder hereof, on the first day of April, 1869, at the office of the Ohio Life Insurance and Trust Company, in the city of New York, thirty-five dollars interest, due on that day on their bond, No. 385.

\$35.

M. G. MITCHELL, President.”

The guaranty upon each coupon was as follows :

“ The Cleveland, Columbus and Cincinnati Rail Road Company, for value received, hereby warrant and guarantee the punctual payment of the interest and principal of this obligation.

In testimony whereof, the said company, in pursuance of a resolution of the board, passed 6th day of March, 1854, have caused these presents to be signed by its president, this 7th day of April, 1854.

The Cleveland, Columbus and Cincinnati Rail Road Company,
By H. B. PAYNE, President.”

The defendants, in their answer, set up as a defense that the guaranty was unauthorized and without consideration, and that the plaintiffs had notice of it ; also that the bonds were purchased from the Columbus, Piqua and Indiana Rail Road Company, by one William Dennison, jun. for less than their par value, and that Dennison was, at the time of such purchase, a director of that company ; and that by the laws of Ohio the bonds thereby became null and void ; and that the defendants were induced to make the guaranties by false representations made by the said Dennison, and one William Neil, of all of which the plaintiffs had notice. Also that the defendants were accommodation guarantors, and that the plaintiffs took the bonds with knowledge of the matters alleged by the defendants, and paid nothing except a small per centage for the bonds. Also that the original issuing of the bonds

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was contrary to the laws of Ohio. Also that an injunction was pending, which forbade the payment.

Both parties were foreign corporations; the plaintiff being incorporated under the laws of the state of Connecticut, and the defendant, under the laws of the state of Ohio. The only demand ever made, for the payment of the coupons, before this suit was brought, was one made on the assignees of the Ohio Life Insurance and Trust Company, at the office of which company, in New York, they were made payable. The company itself had previously failed, and had no office in New York. No demand was ever made of the makers, or of the guarantors, before suit brought. The action was tried at the New York circuit, in January, 1862, before Justice PECKHAM and a jury, and, under the instructions of the judge, the jury found a verdict for the plaintiffs for \$6378.62, being \$4900 for the aggregate amount of the coupons, and \$1478.62 for interest thereon. From the judgment entered on the verdict the defendant appealed.

E. S. Van Winkle, for the appellant. I. The judge erred in directing the jury to allow the plaintiffs interest on the coupons from their respective dates, because interest on interest cannot be recovered until *after* judgment, or upon a special agreement, made *after* the interest is due. (*State of Connecticut v. Jackson*, 1 *John. Ch.* 13. *Van Benschoten v. Lawson*, 6 *id.* 313. *Toll v. Hiller*, 11 *Paige*, 228. *Mowry v. Bishop*, 5 *id.* 98. *Quackenbush v. Leonard*, 9 *id.* 334. *Doe v. Warren*, 7 *Greenl.* 48. *Sparks v. Garregues*, 1 *Bin.* 165. *Hastings v. Wiswall*, 8 *Mass. R.* 455. 2 *Parsons on Cont.* 428, and cases referred to in note r.) The case of *Greenleaf v. Kellogg*, (2 *Mass R.* 548,) is overruled in 8 *Mass.* 455, and 7 *Greenl.* 48.

II. The defendants, being indorsers or guarantors, without consideration, and for accommodation, are only liable to *bona fide* holders, for value received, to the extent of the value paid, and the defendants having shown they were mere

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accommodation indorsers, the burden of proving *bona fides*, and value paid, was on the plaintiffs, which they had failed to do, so far as regards the *bona fides*. (*Chitty on Bills*, 70, 9th ed. *Wiffin v. Roberts*, 1 *Esp.* 261. *Ingalls v. Lee*, 9 *Barb.* 647. *Rapelye v. Anderson*, 4 *Hill*, 472.) (1.) The defendants were mere accommodation indorsers or guarantors. The bonds were the liabilities of the Piqua Rail Road. None of the proceeds were to be received by the defendants. There was no binding obligation on any body to do any thing for the defendants, in consequence of their guarantying the bonds. In the eye of the law, they were mere accommodation indorsers. The guaranties were given on the 7th April, 1854, and under the alleged authority of a resolution passed on 6th March, 1854. These bonds at that time were the property of Messrs. Neil & Denison, to whom the Piqua road sold them on 25th February, 1854. The Piqua road had no interest in the guaranty, and the defendants did not and were not to receive any consideration from said Neil & Denison. (2.) The plaintiffs were not *bona fide* holders of the bonds. They did not receive them in the usual course of business. They did take with them notice of facts to impeach their validity. The *bona fides* is not determined by the adequacy of the consideration; for a low price or a high price may be equally paid in good faith or in bad faith. Neither is the *bona fides* determined by the belief that the guaranties were valid, for such an honest belief, coupled with notice, actual or constructive, that they were not valid, would defeat the *bona fides*. Now, the plaintiffs had such notice that the bonds were not valid. The guaranty was by one rail road company of the bonds of another rail road. This act requires a special legal authority, and purchasers were bound to see that it existed. The guaranty expressed it was in consequence of a resolution of the board, passed at such a time. This showed it was not an ordinary act, done by general authority, but an extraordinary act, done by special authority. The purchasers were bound to inquire whether such

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resolution was in pursuance of any legal authority. The simultaneous indorsement of three separate guaranties on the bonds of one rail road company by three several rail road companies was notice that it was a special act and not in the ordinary and legitimate business of a rail road company. Inquiry would have shown that the indorsement was unauthorized. The plaintiffs were allowed by the judge to recover the face of the coupons and interest, and yet it appears they paid only about 75 or 80 per cent for them.

III. The guaranty was void, because neither the charter of the defendants, nor any law of the state of Ohio, nor any general rule of law, authorized the defendants to indorse the bonds. See the charter of the company, where the corporators are incorporated "for the purpose of constructing a rail road from the city of Cleveland, through the city of Columbus and the town of Wilmington, to the city of Cincinnati, and they are hereby invested with the powers and privileges which are by law incident to corporations of a similar character, and which are necessary to carry into effect the objects of the company." The act of revival conferred no additional powers. The defendants, therefore, had no authority, by their charter, to indorse the bonds of another rail road company. Nor had they such right by any general principle of law. (*Bank of Genesee v. The Patchin Bank*, 3 Kern. 309. *Morford v. Farm. Bank of Saratoga*, 26 Barb. 568. *Bridgeport Farm. and Mech. Bank v. The Empire Stone Dressing Co.*, 10 Abb. Pr. R. 47.) But the power is claimed to be found in the acts passed March 3, 1851, and May 1, 1852. There are four provisions in these acts under which, if at all, the right of the defendants to guaranty the bonds of the Piqua company can be found. These four are as follows: The first authorizes two rail road companies, in certain contingencies, to consolidate themselves into one corporation. That is not this case. The third authorizes any rail road, in certain cases, to purchase or lease all or any part of another road. That is not this case. The fourth authorizes any two or more rail

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roads, whose lines are connected, to enter into any arrangement for their common benefit. This evidently refers to arrangements as to the management of the road, price of fare, time of running, number of trains, &c. It only remains to notice the second provision, which is in these words: "Any rail road company, heretofore or hereafter incorporated, may, at any time, by means of subscription to the capital stock of any other company, or otherwise, aid such company in the construction of its rail road, *for the purpose* of forming a connection of said last mentioned road with the road owned by the company furnishing such aid." Now, this subscription was not made for such purpose, but for the purpose of freeing another rail road from an injunction, and to enable it to change its gauge. These remarks relate to the act of 1851. The act of 1852 is in substance the same.

IV. The bonds themselves were void under the laws of the state of Ohio, act of December 15th, 1852, which declares that no bonds issued by any rail road company of the state of Ohio shall be purchased by a director of the institution at less than par, and if so purchased shall be made null and void; and these very bonds of the Piqua company were purchased by Dennison, when he was a director of said company. The resolution authorizing the issue of the bonds was passed January 7, 1854. Dennison was then a director, and was present at the meeting. The written agreement of sale to Dennison was concluded on the 25th February, 1854. On the 14th February, 1854, Dennison was re-elected. He offered a resignation on March 3, 1854, which was accepted, and the office declared vacant; but the laws of Ohio declare that directors shall continue such until their successors are elected and qualified. (*Act of February 11, 1848, § 7.*) Notes and other commercial paper, when declared void by statute, are void even in the hands of *bona fide* holders. (*See Rost v. Goddard, 3 McLean, 102. Bridge v. Hubbard, 15 Mass. R. 96. Sauerwein v. Brunner, 1 Harris & Gill, 377. Lucas v. Wool, 12 S. & M. 157. Story on Promissory Notes, § 192.*

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3 *Kent's Com.* 87, 90. *Chitty on Contracts*, "of contracts void by statute.")

V. If the bonds were void the guaranty was void. It is of the essence of a guaranty that there should be the valid obligation of a principal debtor. If there be no valid obligation, the guarantor or indorser is not bound. (*Warren v. Crabtree*, 1 *Greenl.* 169. *Garther v. F. and M. Bank of Georgetown*, 1 *Peters*, 37; *S. C.* 7 *Curtis*, 441. *Harrison v. Hammell*, 5 *Taunt.* 780. *Swift et al. v. Beers*, 3 *Denio*, 70. *Hayden v. Davis*, 3 *McLean*, 277. *Bright et al. v. Schuer*, *Ohio Rep.* 139, 141. *Robinson v. Abell*, 17 *id.* 36, 43.) Neither was there any sufficient presentation for payment. If the place or office named had ceased, or become impracticable, a demand should at least have been made of the guarantor, and of the maker, and it would seem that notice of presentment and non-payment by the maker should have preceded a suit against the guarantor.

VI. As the bonds were not indorsed by the payee therein named, the plaintiff cannot legally be the holder thereof. (*Avery v. Latimer*, 14 *Ohio Rep.* 542, 544.)

VII. This court has no jurisdiction of this case. The suit is brought by a foreign corporation; the defendant is a foreign corporation; no suit can be brought against a foreign corporation, except in the following cases. 1st. When the plaintiff is a resident of this state. 2d. When the plaintiff is not a resident of the state, when the cause of action shall have arisen, or the subject of the action shall be situated within this state. (*Code of Procedure*, § 427.) Neither the cause of action arose here nor is the subject matter situated here. The cause of action arose in Ohio, where the bonds and guaranties were made and executed, and where the parties to the contract resided. There is no subject of this action here; that clause relates to specific personal or real property situated here. If this action has any "subject," it is the defendant's contract. The object of the action was undoubtedly to get defendant's money in New York, but the subject of an

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action and the object of an action are distinct things. (*The Western Bank v. The City of Columbus*, 7 *Howard*, 238. *Cantwell v. Dubuque Western R. R. Co.*, 17 *id.* 16. *Whitehead v. Buffalo and Lake Huron R. R. Co.*, 18 *id.* 218. *Campbell v. Proprietors of Champlain and St. Lawrence R. R. Co.*, *Id.* 412.) See as to "subject matter of the action," *Bank of Commerce v. The Rutland and Washington R. R. Co.*, (10 *Howard*, 1.) Where the court has not jurisdiction of the subject matter, no consent or appearance can confer jurisdiction, and an objection to jurisdiction can be taken at any stage of the action. (*Harriot v. The N. J. R. R. and Trans. Co.*, 2 *Hilton*, 262, and cases there cited.)

Wm. E. Curtis, for the respondent. I. The defendant's first exception is that by which it makes the objection that the bonds were not made under seal, and not indorsed by the payee. The court properly overruled the objection. The bonds are drawn payable in the city of New York to *Elias Fassett* or holder, and are negotiable, passing by delivery, and have been so adjudged. (*Zabriskie v. The Cleveland, Columbus and Cincinnati R. R. Co.*, 23 *How. U. S. Rep.* 400.) The bonds and coupons are payable in this state, and the cause of action arose here, and the law merchant applies to their transfer. (*The Conn. M. L. Ins. Co. v. The C. C. and C. R. R. Co.*, 23 *How. Pr. Rep.* 180.) There is nothing in the laws or decisions of Ohio changing the law merchant as to the transfer of notes or securities payable to "*any person or holder.*" It has been repeatedly held in Ohio that affixing seals to such an instrument does not vary the commercial characteristics of the paper. (*Bain v. Wilson*, 10 *Ohio Rep.* 19. *Bank of St. Clairsville v. Smith*, 5 *id.* 222.)

II. The second exception of the defendant is to the ruling of the judge, that the plaintiff is entitled to recover interest upon the coupons. The judge did not err. The coupons are negotiable promises to pay a certain sum of money at a certain time to the holder, so made as to be cut off and be cir-

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culated independently of the bonds. If not paid when due, the general rule as to interest applies to them, the same as to any other negotiable security. It is a contract between the maker and the holder, and may be sued without producing the bond. (*Commissioners of Knox County v. Aspinwall*, 21 How. U. S. Rep. 539. *Redfield on Railways*, § 239, and cases cited in note. *Hollingsworth v. Detroit*, 3 McLean, 472. *County of Beaver v. Armstrong*, 20 Legal Intelligencer, 44. *Watkinson v. Root*, 4 Hammond's Ohio Rep. 373. *Fobes v. Canfield*, 3 id. 18. *Pierce &c., ex's, v. Rowe*, 1 Adams' N. H. Rep. 179. 2 Curwen's Ohio Stats. 1407, 1569. 3 id. 2317.)

III. The third exception of the defendant is to the judge's refusal to instruct the jury that the defendant, being indorser or guarantor without consideration and for accommodation, is only liable to *bona fide* holders for value received to the extent of the value paid, and the defendant showing it is mere accommodation indorser, the burden of proving *bona fides* and value is on the plaintiff. The judge did not err. The consideration is expressed on the face of the guaranty. *Miller v. Cook*, 22 How. Pr. Rep. 66.) If it is admissible to inquire beyond the face of the instrument, then the plaintiff urges that there was no evidence in the case, showing that the defendant was indorser or guarantor without consideration, but, on the contrary, showing that it was guarantor for a good consideration. The only evidence, independent of the face of the paper, in respect to the consideration for the guaranty, is to be found in the printed record in the case of *Zabriskie v. The Cleveland, Columbus and Cincinnati R. R. Co.*, reported 23 How. U. S. Rep. 381, and in which it clearly appears that there was a good and valuable consideration, viz: the obtaining control, by the defendant, of various beneficial interests, including a change of gauge and rail road connection, to increase their business. (*See opinion, on this point*, 23 How. 399.) Even if there had been evidence to warrant the judge in charging, as requested, that

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the guaranty was without consideration and for accommodation, still there is no foundation for the limitation of the defendant's liabilities as claimed, and if there was, it must apply to an action on the bonds and not to one on the coupons, as they are of themselves an independent engagement, and negotiable. The laws of Ohio, in relation to the issue of these bonds, expressly negative any such limitation of liability. The statutes of Ohio provide, that in case of sales of bonds, by directors, at a discount, "Such sale shall be as valid in every respect, and such securities as binding for the respective amounts thereof, as if they were sold at their par value." (*Swan's Ohio Stat.* 200, 240.) The supreme court of Ohio held, on appeal, that these very bonds were valid securities, and held that an order requiring the bondholders to state the amounts paid for the bonds was erroneous. (*Cox v. Columbus and Piqua R. R. Co.*, 10 *Ohio Rep.* 375, 395 to 399, and 410.) There was no attempt, on the part of the defendant, to show any notice to the plaintiff, of any of the matters set up in the answer.

IV. The judge very properly declined to instruct the jury, as requested, that the guaranty of the defendant was unauthorized and unlawful. He followed the decision of the supreme court in the case of *Zabriskie* against the defendant, (23 *How.* 381,) where the same questions, in respect to these bonds, were considered and decided, and upon the same evidence. The statutes of Ohio authorized the making of the guaranty by the defendant. (2 *Curwen's Ohio Stat.* p. 1657, § 4. 3 *id.* p. 1884, § 24. *Zabriskie v. Cleveland, Columbus and Cincinnati R. R. Co.*, 23 *How. U. S. Rep.* 395 to 399.) The plea of *ultra vires*, according to its just meaning, imports, not that the corporation could not, and did not in fact make the unauthorized contract, but that it ought not to have made it; such a defense therefore necessarily rests upon the violation of trust or duty toward the shareholders, and it is not to be entertained where its allowance will do a greater wrong to innocent third parties. The acquiescence of the

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shareholders in the abuse will prevent the interposition of such a plea. (*Bissell v. The Mich. Southern and Northern Indiana R. R. Co.*, 22 N. Y. Rep. 258. *Society for Savings v. New London*, 1 Am. Law Reg. [N. S.] 241.)

V. The judge did not err in declining to instruct the jury as requested, that the plaintiff could not recover because the bonds were void under the act of the state of Ohio, passed December 15, 1852, in respect to annulling bonds purchased by a director of the institution issuing them, at less than par, and also that Dennison was in law a director when he purchased them. The supreme court of Ohio have decided that these identical bonds are valid securities, and upon which the holders are entitled to recover the full amount and interest, without reference to what they paid for them. (*Coe v. Columbus and Piqua R. R. Co.*, 10 Ohio Rep. 395 to 399 and 410.) The United States supreme court say; "In deciding upon this contract, we deem it unimportant to settle whether Dennison was a director of the Piqua company the 25th of February, 1854, when he signed the contract with the committee of the Piqua board of directors." (*Zabriskie v. C. C. and C. B. R. Co.*, 23 How. U. S. Rep. 399.) The testimony shows Dennison was not a director of the Piqua company.

VI. The court did not err in declining to instruct the jury that if the bonds were void the guaranty was void. (1.) The United States supreme court held, that in deciding upon the validity of the guaranty it was unimportant to settle whether the bonds of the Piqua Company were null and void. "The contract of the guarantors, indorsing the bonds, is a distinct contract, and may impose an obligation upon them, independently of the Piqua company." (*Zabriskie v. C. C. and C. B. R. Co.*, 23 How. U. S. Rep. 399.) An indorser is liable though the maker's name is a forgery, or the note for any other reason is void. (*Edwards on Bills*, 289.) (2.) The guarantor may be held although no suit could be maintained upon the original debt, and such guaranty may have been required for the very reason that the original debt could not

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be enforced at law, as where the guarantor promises to be responsible for goods to be supplied to a married woman, or to be sold to an infant, not being necessaries. (1 *Parsons on Contracts*, 494, and cases cited in note. *Mann v. Eckford*, 15 *Wend.* 502.) (3.) The defendant's objection does not extend to the coupons, but is limited to the bonds only.

By the Court, SUTHERLAND, P. J. This action was brought to recover the amount due on one hundred and forty coupons originally attached to twenty bonds issued by the Columbus, Piqua and Indiana Rail Road Company, the payment of which was guarantied by the defendant by written indorsements on the bonds, guarantying the payment of principal and interest.

The defendant sets up in its answer that the guaranties were unauthorized and without consideration, and that the plaintiff had notice of it; also, that the bonds were purchased from the Piqua company by one William Dennison, jun. for less than their par value, and that he was at the time of such purchase a director of that company, and that, by the laws of Ohio, the bonds, for that reason, became void; and that the defendant was induced to make the guaranties by false representations made by the said William Dennison, jun. and one William Niel, of all which the plaintiff had notice; also, that the defendant was accommodation guarantor, and that the plaintiff took the bonds with knowledge of the matters alleged by the defendant, and paid nothing except a small per centage for the bonds; also, that the original issuing of the bonds was contrary to the laws of Ohio; also, that an injunction was pending which forbade payment.

On the trial of the action at the circuit, there was a verdict for \$6378.62 for the plaintiff, from the judgment entered on which the defendant has appealed to the general term.

The bonds are payable in the city of New York, to Elias Fassett or holder. They are negotiable, passing by delivery, and would have been had they been under seal. Their nego-

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tiability was assumed, if not decided, in *Zabriskie v. The Cleveland, Columbus and Cincinnati R. R. Co.*, (23 How. U. S. Rep. 400.) Similar bonds have repeatedly been held by the courts to be negotiable. It was so held or assumed recently by the court of appeals of this state, in actions on one or more Harlem Rail Road bonds, under seal, I believe. (See also *Redfield on Rail.* § 239, and cases cited in note.) It has been repeatedly held in Ohio that affixing a seal to such an instrument does not affect its negotiability. (See *Bain v. Wilson*, 10 Ohio Rep. 19; *Bank of St. Clairsville v. Smith*, 5 id. 222.) The English decisions are, too, I think, to the same effect. This point was raised by the defendant's first exception, on the introduction of the bonds in evidence, and subsequently by another exception when the case was submitted to the jury. Neither exception was well taken.

In my opinion the judge was right in permitting the plaintiff to recover interest on the coupons. This point is presented by the defendant's second exception. The coupons are negotiable promises to pay a certain sum of money, on a certain day, to the holder; so made as to be cut off and circulated independently of the bonds. If not paid when due, I think interest should be allowed by way of damages, for the delay of payment. They do not contain any express promise to pay interest on the interest, and if they did, I think interest would or should be allowed, not by force of the promise, but as a compensation for the delay of payment, by way of damages.

The general rule is, that where there is a written contract to pay money on a day and at a place fixed, and the contract is broken, interest is allowed. (*Williams v. Sherman*, 7 Wend. 109. *Still v. Hall*, 20 id. 51. 52. *Reid v. Bens. Glass Factory*, 3 Cowen, 436; *S. C.* 5 id. 587.)

The chancery cases in this state are undoubtedly to the effect that compound interest can only be recovered upon a written agreement to pay it, made after the interest upon

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which it operates has fallen due. (*State of Connecticut v. Jackson*, 1 *John. Ch.* 13. *Van Benschooten v. Lawson*, 6 *id.* 313. *Mowry v. Bishop*, 5 *Paige*, 98. *Quackenbush v. Leonard*, 9 *id.* 334. *Toll v. Hiller*, 11 *id.* 228.) In *State of Connecticut v. Jackson*, Chancellor Kent says: "Even an original agreement at the time of the loan, or contract, that if interest be not paid at the end of the year, it shall be deemed principal and carry interest, will not be recognized as valid. Such a provision would not amount to usury; (*Le Grange v. Hamilton*, 4 *T. B.* 613; 2 *H. Black.* 144;) but this court certainly and *perhaps* a court of law would not give effect to such a provision." In *Van Benschooten v. Lawson*, (*supra*,) the chancellor held, that the agreement, though made *after* the interest had fallen due, must be prospective in its operation, as that the interest *then* due and payable should carry interest thereafter. In *Mowry v. Bishop*, (*supra*,) Chancellor Walworth held, that an agreement to pay interest on *ar-rears* of interest, which had already become due, is valid, and that if compound interest is voluntarily paid it could not be recovered back; that the moral obligation of the debtor to make the usual remuneration for the loss of interest sustained by the creditor was a sufficient consideration to support a subsequent agreement in writing to pay interest on such arrears of interest. I have some difficulty in seeing, if such moral obligation is sufficient to support such subsequent written promise, why it was not right to allow the plaintiffs in the principal case interest upon their coupons without any promise. In *Mowry v. Bishop*, the chancellor said, that the principle that an agreement to pay interest upon interest to accrue after the making of the agreement, cannot legally be enforced, was adopted merely "as a rule of public policy, to prevent an accumulation of compound interest in favor of negligent creditors who do not call for the payment of their interest when due." The reason or ground of the general rule, that interest upon interest cannot be recovered, as thus stated, certainly does not apply to the principal case, and

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should not have prevented a recovery of the interest on the coupons. There is no danger of rail road creditors being negligent in presenting their coupons for payment, though they may run other risks. Rail road corporations certainly do not need protection from want of diligence on the part of their creditors.

In *Van Benschooten v. Lawson*, (*supra*,) Chancellor Kent said that agreements to pay interest on interest to accrue would not be enforced, because they were oppressive. I repeat, certainly there is no danger of rail road corporations being oppressed from want of diligence on the part of their coupon creditors.

As to how far the general rule or principle before adverted to, as established by the chancery cases in this state, has been recognized by the courts of law of this state, see *Kellogg v. Hickok*, (1 *Wend.* 521;) *Jackson v. Campbell*, (5 *id.* 572;) *Boyer v. Pack*, (2 *Denio*, 107;) *Van Rensselaer v. Jones*, (2 *Barb. S. C. Rep.* 666, 667;) *Forman v. Forman*, (17 *How. Pr. R.* 255;) *Henderson v. Hamilton*, (1 *Hall*, [*N. Y. Superior Court*,] 314.) In *Van Rensselaer v. Jones*, Judge Willard appeared to think it by no means clear that the cases in this state would prevent a recovery of interest on interest in a case like the principal case.

There is no doubt that in several of the states the plaintiffs would have been permitted by the courts to recover interest. (See *Catlin v. Lyman*, 16 *Verm.* 45; *Greenleaf v. Kellogg*, 2 *Mass.* 548; *Hastings v. Wiswall*, 8 *id.* 455; *Watkinsdn v. Root*, 4 *Ham. Ohio Rep.* 373; *Pierce v. Rowe*, 1 *Adams' N. H. Rep.* 179; *Hollingsworth v. Detroit*, 3 *McLean*, 472.)

Upon the whole I can see no good reason nor controlling authority for saying, that the plaintiff should not have recovered interest on its coupons. From the transaction, I infer, that the Piqua company expected to pay interest on its coupons if they were not paid when due.

The judge was right in declining to instruct the jury, as requested by the defendant, that the defendant being in-

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dorser or guarantor, without consideration, and for accommodation, is only liable to *bona fide* holders for value received, to the extent of the value paid, and the defendant showing that it is a mere accommodation indorser, the burden of proving *bona fides* and value is on the plaintiff. The defendant was not accommodation indorser or guarantor. There was a sufficient consideration expressed on the face of the guaranty. The words "value received" imported a sufficient consideration. (*Miller v. Cook*, 22 How. Pr. Rep. 66. *Douglas v. Howland*, 24 Wend. 35.)

I think, too, the case shows a sufficient consideration for the guaranties outside of them. A rail road corporation must be presumed to be created not only for public convenience, but also for private profit. The arrangement which was entered into between the defendant and the other companies, of which the guaranties were a part, was entered into for the purpose of securing a uniform gauge of the connecting roads, and thus to increase its business and profits. The presumption is that the defendant has received the anticipated advantages from the arrangement. I think, therefore, that the defendant's third exception was not well taken.

In my opinion the judge was also right in declining to instruct the jury, as requested, that the guaranties were unauthorized and unlawful. No doubt the plea of *ultra vires* raised the question of the corporate power of the defendant to make the guaranties, as between the corporation and the state of Ohio, and not merely the question as between the corporation and its shareholders, whether the making of the guaranties was a breach of trust. A corporation is the mere creature of law, and cannot act at all without law. A contract made by it, without authority, is void, even in the hands of a *bona fide* holder, for value. Its legal capacity to contract cannot be enlarged by estoppel.

But, I think, the defendant was authorized by the sections of the general rail road laws of Ohio, inserted in the case, to enter into the arrangement with the other companies, and to

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make the guaranties as a part thereof. These sections declare, that "any rail road company, heretofore or hereafter incorporated, may, at any time, by means of subscription to the capital stock of any other company, or otherwise, aid such company in the construction of its rail road, for the purpose of forming a connection of said last mentioned road with the road owned by the company furnishing such aid," &c. There is another clause of these sections which authorizes any two or more rail roads, whose lines are connected, to enter into any arrangement for their common benefit. The counsel for the defendant insists, that this last provision evidently refers to arrangements as to the management of the road, price of fare, time of running, number of trains, &c. But I do not see why this limited construction should be given to the provision, particularly as against the plaintiff, who is a *bona fide* holder for value, there being nothing in the case showing that it had notice of any of the defenses set up in the answer. The language is broad enough to cover the arrangement which the defendant entered into with the other companies, and the guaranties as a part of it. Perhaps this question of power may be said to have been decided in *Zabriskie v. Cleveland, Columbus and Cincinnati R. R. Co.*, (23 How. U. S. Rep. *supra*,) although that action was brought by Zabriskie as a shareholder.

It is not necessary to inquire or decide whether the acts of the defendant were authorized or ratified by a vote of the stockholders, in accordance with the provisos of the said sections of the Ohio general statutes, if the defendant had the general power to make the guaranties; for these provisos were intended for the protection of the shareholders, and relate rather to the mode or manner of the execution of the power; and the plaintiff had a right to presume that the defendant had done its duty, and had proceeded regularly in the execution of the power. (*See Commissioners of Knox Co., Indiana, v. Aspinwall*, 21 How. U. S. Rep. *opinion*, 545; *The Royal British Bank v. Tarquand*, 6 Ellis &

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Blackb. 327; and Zabriskie against this same defendant, 23 U. S. Rep. supra.)

This doctrine does not at all interfere with the principle of the limitation of the powers of corporations and its consequences, before stated. Third parties dealing with a corporation are bound to know the law; that is, they are bound to take notice of the extent of its powers, but they have a right to assume, in the absence of any thing suggesting inquiry, that it has proceeded regularly in the execution of its powers. I think, therefore, the defendant's fourth exception was not well taken.

I think the judge was also right, in declining to instruct the jury, as requested by the defendant, that the plaintiff could not recover because the bonds were void, under the Ohio act of December 15, 1852, declaring that no director of a rail road company shall purchase any of the bonds, &c. of any rail road of which he may be a director, for less than the par value thereof, and that all such bonds, &c. so purchased, shall be void. The supreme court of Ohio has decided that these bonds were valid securities, and upon which the holders are entitled to recover the full amount of principal and interest, without reference to the amount paid for them. (*Coe v. Columbus and Piqua R. R. Co.*, 10 *Ohio Rep.* 395, 399 and 410.) In *Zabriskie* against these same defendants, (23 *How. U. S. Rep. supra.*) the United States supreme court say: "In deciding upon this contract, we deem it unimportant to settle whether Dennison was a director of the Piqua company on the 25th February, 1854, when he signed the contract with the committee of the Piqua board of directors." I doubt, too, whether Dennison was a director on the 25th of February, 1854, within the meaning and intent of the act of December 15, 1852, although he may have been within the meaning of the Ohio act of February 11th, 1848, declaring that directors shall continue such, until their successors are elected and qualified. I think, therefore, the defendant's fifth exception was not well taken. Neither do I think that

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the defendant's sixth exception was well taken. The judge declined to instruct the jury that, if the bonds were void, the guaranties were void. In the case of *Zabriskie*, the United States supreme court held that it was not necessary to settle whether the bonds of the Piqua company were void. The court said, "The contract of the guarantors, indorsing the bonds, is a distinct contract, and may impose an obligation upon them independently of the Piqua company." An indorser may be liable, though the maker's name is a forgery. (*Herrick v. Whitney*, 15 John. 240. *Shaver v. Ehle*, 16 id. 201. See also, 1 *Parsons on Con.* 494, and cases cited in notes.)

It was decided by the general term, in this action, the bonds and coupons being payable here, that the cause of action arose here, and that this court had jurisdiction, though both parties were foreign corporations. (*The Connecticut M. Ins. Co. v. The C. C. and C. B. R. Co.*, 23 How. Pr. Rep. 180.)

My conclusion is that the judgment should be affirmed with costs.

[NEW YORK GENERAL TERM, November 30, 1863. *Sutherland, Leonard and Mullin*, Justices.]

 CHESBROUGH vs. WRIGHT and LOSEE.

An insurance company, although authorized to receive notes for advanced premiums to be written against, and to allow a certain interest thereon, is not authorized to allow five per cent on the whole amount, without deduction for such sums as may be written against.

An agreement to that effect is illegal, and the note cannot be recovered on, by the company. But as the statute does not make the note void, a third person, receiving it before it became due, for a valuable consideration and without notice of the illegal agreement, will be entitled to recover. SUTHERLAND, P. J. dissented.

But merely receiving a note in part payment of a precedent debt, does not constitute a parting with value, which will render the holder a *bona fide* holder for value.

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ACTION upon a promissory note, for \$1000, made by the defendant on the 8th of November, 1855, payable to his own order, six months after date, and indorsed by him in blank, and delivered to the Atlas Mutual Insurance Company, in the city of New York. The action was tried before the court, without a jury, a jury having been expressly waived; and after hearing the proofs of the parties, and the arguments of counsel, the judge found the following facts and conclusions of law: 1st. The Atlas Mutual Insurance Company was incorporated by an act of the legislature of the state of New York, passed April 10th, 1843; it was organized and went into operation on the 1st day of May, 1852; became insolvent and ceased to exist on the 5th of March, 1856. 2d. Aaron C. and Lewis R. Chesbrough were partners in the mercantile business from 1851 until since the commencement of this action; Aaron C. has since died, and Lewis R. is the sole survivor. 3d. Lewis R. Chesbrough was a stockholder and trustee in the said Atlas Mutual Insurance Company from its organization until its close. 4th. By its charter, the company, for the better security of its dealers, was authorized to receive notes for premiums in advance, of persons intending to receive its policies, and to negotiate them for the purpose of paying claims or otherwise, and to allow a compensation not to exceed five per cent on the notes so advanced; under that power the company, on the 12th of October, 1855, passed a resolution to take up a subscription of \$40,000, and a subscription was started in which the subscribers thereunto agreed to give their notes for the amount subscribed, at four months in advance of premiums, to said company. The whole sum was subscribed. 5th. On the 8th of November, 1855, the trustees of said company passed the following resolution: "Resolved that a subscription in the sum of \$400,000 in premium notes to be written against be obtained; subscriptions to be binding when \$300,000 is subscribed, including the \$40,000 already subscribed." The subscription paper under that resolution reads as follows: "We the subscribers

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hereunto, agree to give to the Atlas Mutual Insurance Company our notes in advance of premiums of insurance, at six and twelve months, in equal amounts, for the sums set opposite our names respectively, it being understood that, in consideration thereof, the subscribers are to be allowed by the company, at the maturity of their notes, five per cent on the amount thereof. This subscription is toward the \$400,000 subscription authorized by a resolution of the board of trustees of this date, and is not to be binding until the sum of \$300,000 is subscribed." The defendants subscribed to such paper the sum of \$5000. 6th. That the whole amount actually subscribed to such paper was but \$225,000, excluding the 40,000 subscription of October 12th, 1825, and the sum of \$37,500 subscribed by insurance companies of this and other states, but including the subscriptions of the insurance companies and the \$40,000, it exceeded the sum of \$300,000. 7th. That the defendants were subscribers to the \$40,000 subscription. 8th. On the 30th of November, 1855, the board of trustees of the Atlas Insurance Company passed the following preamble and resolution: "It being understood that \$300,000 is now subscribed under the resolution of the board of November 8th, it is therefore resolved, that the officers commence at once to collect the notes to that amount, and proceed in liquidating the liabilities of the company therewith." And in pursuance of that resolution, the president of the company called upon the defendants to give their notes, representing that the \$300,000 had been subscribed. The defendants, relying upon that statement, thereupon gave their notes, dated November 8th, 1855, of which the note in suit is one. 9th. The note in suit was transferred to the plaintiffs by the company on the 30th of January, 1856, in part payment of a loss sustained by them on a risk insured in the company, the exact amount of which had not then been ascertained, but had been presented to the company more than thirty days prior to such transfer; and that the amount of said loss exceeded the amount of notes transferred, and the

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said note was receipted by L. R. Chesbrough, for the firm. 10th. That at the time said note was transferred to the plaintiffs, the company was largely indebted to others, as well as to the plaintiffs. 11th. That the \$40,000 subscription of October 12th, 1855, was never made confidential. 12th. That the several insurance companies which subscribed to the \$400,000 subscription of November 8th, 1855, did so without authority by resolution from their several boards; that the general powers and privileges of said corporations are such as are conferred by the 18th chapter of the first part of the revised statutes, the right to make insurance on vessels, freight, goods, dwellings, stores, &c. and to cause themselves to be reinsured against any risk or risks, upon which they have made or may make insurance. 13th. That the amount of the note sued on, with interest at 7 per cent, to the date of the report was \$1255.24.

From these facts the judge's conclusions of law were,

First. That the plaintiffs were not bona fide holders of the note in suit without notice of its character, but held the same subject to all defenses which would exist against it in the hands of the Atlas Insurance Company. *Second.* That the subscription of the several insurance companies to the subscription of November 8th, 1855, was void. *Third.* That the condition precedent to the subscription of the defendants becoming operative and binding having never been performed, no legal liability attached to them to pay; and their note, obtained by false representations as to the performance of the condition precedent, had no validity in the hands of the insurance company, or in the hands of those who took it with notice. He therefore directed that the complaint be dismissed, and that judgment be entered for the defendants for costs. The plaintiff appealed to the general term.

Britton & Ely, for the appellant.

Beebe, Dean & Donohue, for the respondents.

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BARNARD, J. The company were authorized to receive notes for advanced premiums to be written against and allow certain interest thereon; but were not authorized to allow as they undertook to do in the case of the note in suit, five per cent on the whole amount without deduction for such sums as might be written against. This agreement was illegal. (2 *Kernan*, 569.) Consequently none of the notes the giving of which formed a part of the agreement could be recovered on by the company. As however the statute does not make the note void, the plaintiffs, if they received it before it became due, for a valuable consideration, without notice of the illegal agreement, would be entitled to recover. (*Willmarth v. Crawford*, 10 *Wend.* 341. *Rockwell v. Charles*, 2 *Hill*, 499.) In this case, however, the plaintiffs are not bona fide holders for value. It is found and the case shows that they merely received the note in part payment of a precedent debt. That this does not constitute a parting with value has been expressly held by the general term of this district in *Spear v. Myers*, (6 *Barb.* 445.) I am not aware that that case has been overruled. It is true it has been held that one who receives a note indorsed without restriction for the accommodation of the maker, in payment of a precedent debt, may recover on it; but this was so held on the ground that the maker had a right to appropriate it to any purpose he should deem most for his interest, and such appropriation, when made, rendered it valid in the hands of the holder. This view of the case renders it unnecessary to consider the other points raised. Judgment affirmed, with costs.

CLERKE, J. I concur in affirming the judgment on the ground deduced from the third conclusion of law found by the judge who tried the cause.

SUTHERLAND, P. J. dissented.

Judgment affirmed.

[NEW YORK GENERAL TERM, December 7, 1868. *Sutherland, Clarke and Barnard*, Justices.]

OOTHOUT *vs.* BALLARD and others.

The maker of a promissory note has the whole of the last day of grace within which to pay it; and though he should in the course of the day refuse payment, which will entitle the holder to protest it and give notice to the indorsers, yet if he subsequently, on the same day, makes payment, it is good, and the notice of dishonor becomes of no avail. Hence an action commenced on the third day of grace, though after protest, will be prematurely brought.^(a)

In respect to the time for commencing a suit, there is no distinction between a note payable at a bank, and one payable at large, or at the counting house of the maker.

THIS action was brought against the defendants as indorsers of a promissory note, which fell due at the Bank of Chemung, 26 and 29th November, 1862, (*Saturday*), on which day the Elmira banks opened at 10 in the morning and closed at 1 P. M. The holders had left the note with the Elmira Bank for collection, and Mr. Corey, the cashier of the Elmira Bank, during bank hours, on the 29th November, presented the note for payment to the Bank of Chemung, which was refused. The note was thereafter protested, and due notice thereof directed to the defendants under their firm-name of W. W. Ballard & Co. (by which name they had indorsed the note) deposited in the post office at Elmira, where the defendants reside, which was received by one of the defendants about a quarter to 6 o'clock P. M. and *before* the service of the summons and complaint in this action, which were served shortly thereafter, and on the same day. The maker did not defend, but the indorsers severally put in answers in which they insisted that the action was prematurely brought. The action was tried at the Chemung circuit in April, 1863, before Hon. JOHN M. PARKER. The only question upon the trial was whether the suit could be brought upon the note on the last day of grace. The judge decided that it could, because the note was payable at a bank; and that was the only question presented by the exceptions.

(a) See *Smith v. Aylsworth*, 40 Barb. 104, S. P.

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Smith, Robertson & Fassett, for the plaintiff. I. The books are full of cases holding that a note payable at bank is, *by its terms*, an agreement to pay within banking hours. These cases are summed up in *Edwards on Bills*, 526, as settling the principle that, "In respect to bills and notes, payable at bank, *the engagement of the parties is that payment shall be made during the usual hours of business or banking hours*, on the day when the same became payable." And by our court of appeals as follows: "By making the note payable at the bank, the maker agreed that the note should be paid *during the usual business hours* of the day upon which it matured. In giving effect to the contract the law presumes that the parties intend to conform to the known and established course of business at the place where their contract was to be performed. The general rule, therefore, is, that when the note is payable at a bank, it must be presented for payment *before the usual hour of closing the banking house*." (17 *N. Y. Rep.* 47.) In *Parker v. Gordon*, (7 *East*, 385,) a presentment after bank hours was held insufficient. (*Elford v. Leed*, 1 *Maule & S.* 28.) In *Church v. Clark*, (21 *Pick.* 310,) the same doctrine is held; and in other cases too numerous to cite. (*And see Story on Prom. Notes*, 269.)

II. If the law be correctly stated in the foregoing point, it follows that the note in suit, being made payable at the Bank of Chemung, where banking hours closed at 1 p. m., is the same, in legal effect, as if the words were inserted in the body of the note "payable before 1 o'clock p. m." If the note were so drawn in terms, no one could question the holder's right to sue immediately after one o'clock, and the whole history of the common law does not show an instance where such right was ever denied by the courts. On the contrary, this point has been, in every reported case where made, held with the plaintiffs. (*Veazie Bank v. Wine*, 40 *Maine*, 62.) And see *Id.* 109, where the court held, "If a note is payable at bank, a suit may be properly commenced on the last day

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of grace after banking hours, without demand." *Boston Bank v. Hodges*, (9 *Pick.* 420,) *Church v. Clark*, (21 *Pick.* 310,) holds a like doctrine. *Staples v. Franklin Bank*, (1 *Metc. Rep.* 43; 2 *Hill*, 635,) recognizes the same doctrine. The thorough and exhaustive treatise of Prof. Parsons on Bills and Notes, collates and discusses all the authorities upon this point, stating the law, at p. 462, vol. 2, to be, that where the note is payable at bank "the suit may be commenced after bank or business hours." And see numerous cases cited below, point 5.

III. And there is no reported case holding any other doctrine upon the subject, either in this or any other country. (1.) The cases relied upon by the defendants' counsel are cases where the notes *were payable at large*, and not payable at bank. No one questions that where a contract, other than a bill or note, is to be performed on a certain day, the party has reserved, *by the terms of his contract*, the whole of that day to perform it. In *Osborn v. Moncure*, (3 *Wend.* 170,) the court apply this principle to the note which was there manifestly payable at large, (demand being made at the counting house of the defendant.) In 12 *Wend.* 517, the notes were at six months, and manifestly payable at large, and the remarks in that case upon this question are *obiter*. In 2 *Miles*, 353, the note was payable at large. In 8 *Cowen*, 203, the action was brought on the first day of grace, and the note was payable at large. In 11 *Smedes & M.* 452, the note was payable at large, it seems from note (I), 1 *Parsons on Notes and Bills*, 410, and was decided on authority of *Mart. & Y.* 237, which holds no such doctrine. In 6 *Watts & S.* 179, the note was payable at large, and was sued on the *second* day of grace. See all the English cases cited by defendants' counsel stated at length and reviewed by Shaw, J. 1 *Metc.* 43. (2.) The cases holding that a presentment after bank hours will answer to charge an indorser, if an authorized officer of the bank be found at bank, to whom the presentment can be made, do not shake the legal principle, that the con-

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tract is broken if the payment be not made in business hours, but all recognize it with emphasis. (17 *N. Y. Rep.* 47, &c. 3 *E. D. Smith*, 48.) They limit the rule to those cases *where the maker has no funds*, admitting the maker has failed to perform, and allowing a presentment after time, in order that a formal notice may be given to the indorser, *of such breach already committed*. This rule is in analogy with the rule of law, which does not require a check or bill of exchange to be presented to the drawee, when the *drawer is without funds*, as where it is drawn against a fund. The presentment of a note in such case is a useless ceremony. So the courts held a late one, (and may hereafter hold that *none at all*) will answer when there are no funds. (15 *Maine*, 67. 18 *John*. 231. 2 *Chitty*, 124. 17 *N. Y. Rep.* 48.) It is so held 33 *Penn. Rep.* 134. Nor does the rule, to this extent even, apply when the note has been once presented within business hours. (*Whitaker v. Bank of England*, 1 *Crompt. M. & R.* 744. 6 *Carr. & P.* 700.) Where it is held, that a bank which has refused payment during business hours and after business hours receives funds, and is then called upon by the notary, *is not bound to pay the bill*. (1 *Met.* 43. 3 *E. D. Smith*, 48.) And the same doctrine is even more expressly held in *Martin v. Mechanics' Bank*, (6 *Harris & John*. 235.) Where the court decide that a bank *the holder of a note*, receiving the money of the maker, after dishonor, *may allow the maker to withdraw the funds* and still hold the indorser. And see the same law deduced from the cases, 2 *Parsons, Bills and Notes*, 252. The proof shows here, that the bank closed at 1 P. M. There is no presumption that an officer could have been found there after that hour, who would have done business. If there be, so much the worse for the defendants. Why did not they find him? But within the foregoing decisions, as well as in plain sense, without the aid of decisions, the exceptional rule, allowing a late presentment for some purposes, has no application to the facts of this case.

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IV. But the great question suggested by this case, and probably hereafter to come before the court, is whether the decision in *Osborn v. Moncure*, (3 *Wend.* 170,) is to be stood by or abandoned, out of a "decent respect for the opinions of mankind." That case is an ill-considered case, and cannot be sustained upon principle or authority. Indeed, the reasoning of Judge Sutherland, holding that the right of action against the indorser does not accrue *till the next day after* the indorser is charged, is in itself a solecism, a *felo de se*. How does it stand to reason, that the holder has a right of action against the indorser, legally charged, by reason of the maker's default, and yet having that right of action he can't sue till the next day? It was for a time questioned, whether the demand could be made at any time during the day. (1 *C. & P.* 555, 676. 4 *B. & C.* 339. See 1 *Parsons*, 417. note a; *id.* 414, note s.) But it is now thoroughly settled, that the demand may be made at any reasonable hour of the third day of grace, and when payable at bank, at any time after the bank opens. (1 *Parsons on Bills and Notes*, 417, note a, and authorities cited.) And if not paid on such demand, the maker has failed to comply with his contract, the note is dishonored, and the indorser by proper notice immediately charged. It follows, *ex necessitate*, that the right of action accrues the very moment the indorser is charged, and the moment the holder has a right of action for *the expenses of protest*. No court can hold otherwise and pay respect to "inexorable logic."

V. But the overwhelming *weight of authority* also, is against the doctrine of *Osborn v. Moncure*, and in support of the holder's right to commence his action on the third day of grace, and immediately after the dishonor of the note. (*Staples v. Franklin Bank*, 1 *Metc.* 43. *Greeley v. Thurston*, 4 *Greenl.* 479. *Shed v. Brett*, 1 *Pick.* 401. *Wilson v. Williman*, 1 *Nott & McC.* 440. *Dennis v. Walker*. 7 *N. H. Rep.* 199. *Church v. Clark*, 21 *Pick.* 310. *Manchester Bank v. Fellows*, 8 *Foster*, 302. *Coleman v. Ewing*, 4 *Hum.*

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241. *Lunt v. Adams*, 5 *Shep.* 230. *Leftly v. Mills*, 4 *D. & E.* 170, *Buller, J. McKenzie v. Durant*, 9 *Rich.* 61. *Veazie Bank v. Winn*, 40 *Maine Rep.* 62. *New England Bank v. Lewis*, 2 *Pick.* 125. *City Bank v. Cutter*, 3 *id.* 414. *Park v. Paige*, cited 1 *Metc.* 48. *Crenshaw v. McKiernan*, *Minor*, 295. *Farmers' Bank v. Duvall*, 7 *Gill & J.* 79. *Ammie-down v. Woodman*, 31 *Maine Rep.* 580. And see *Boston Bank v. Hodges*, 9 *Pick.* 420; *Whitwell v. Brigham*, 19 *id.* 117; *Flint v. Rogers*, 15 *Maine Rep.* 67; *Pierce v. Cate*, 12 *Cush.* 190.) And see also an exhaustive review of the cases in 2 *Parsons on Bills and Notes*, 461, deducing the rule as unquestioned, that, when the note is payable at bank suit may be brought after bank hours, and the correct rule to be, where payable at large, that the action may be brought on the third day of grace, after presentment at a reasonable hour; but if no presentment and demand, then not till close of business hours. (1 *Parsons, Notes and Bills*, 410, 421.)

VI. The cases holding the law with the defendants, all fail to discriminate between agreements where grace is allowed, and those where the day of performance is fixed. "These days of grace take their name from being days of indulgence granted to the maker. The usage was at first probably discretionary and voluntary on the part of the holder, and gradually ripened into a right." (*Story, Prom. Notes*, § 215.) The number of days of grace depends upon the custom of merchants in different cities, and the usage of banks. That paper falling due upon the third day of grace differs in respect of the time when it must be paid and *ex necessitate*, in respect of the time when the action lies, is well illustrated by the decisions in respect to bonds, agreements and notes, payable on a day fixed without grace when that day falls on *Sunday*. In all such cases the law gives the maker *the next day* to pay. (*Salter v. Burt*, 20 *Wend.* 205. *Avery v. Stewart*, 2 *Conn. Rep.* 69.) Yet when the *third* day of grace falls on *Sunday* it must be paid *the day before*. And the reason for this difference is, "That as the allowance of the days of grace is a

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mere indulgence to the maker, it shall be granted only in cases when it will not work any extra delay to the holder of the note, but he shall be entitled to strict payment at the *punctum temporis* of the note." (*Story, Prom. Notes*, § 223.) See the question in this aspect discussed, 1 *Metcalf*, 43; 4 *Humph.* 241, and 1 *Parsons on Notes and Bills*, 415.

VII. The defendants' reasoning is in a circle. They argue that the action cannot be brought on the third day of grace, because the banks may reserve the interest in advance for the three days; and in turn it is argued that the interest can be reserved for the three days, because the holder cannot sue till the next day. The defendants' counsel cannot assume that the interest may be reserved for the three days, if that depends upon the question whether the holder can sue on the third day. Suppose the three days interest may be reserved, it is not a logical sequence that the holder may not sue on the third day. The law does not recognize fractions of a day, both upon general principles, and upon the maxim *de minimis*. It is to be observed, however, First. That such a question, to be worthy of consideration, must arise upon a note payable at large, not at bank, where, as shown by our first point, the instrument, in legal effect, expresses the time of day by which it is to be paid; and Second. This discussion has no pertinency here, because no interest was discounted on this note, and could not have been, as the note is drawn upon interest.

R. King, for the defendants. I. An action cannot be brought upon a promissory note on the last day of grace. The maker has the whole of that day to pay it in. (*Oshorn v. Moncure*, 3 *Wend.* 170. *Hopping v. Quin*, 12 *id.* 517. *Bank of Utica v. Wager*, 2 *Cowen*, 766, *per Savage*, Ch. J. *Edwards on Bills and Notes*, 525, 6, 7, 540, and cases there cited. 1 *Parsons on Bills and Notes*, 410 *et seq.* and cases cited. *Wiggle v. Thomason*, 11 *Smedes & Marshall*, 452. *Thomas v. Shoemaker*, 6 *Watts & Serg.* 179. *Walter v. Kirk*, 14 *Ill. Rep.* 55.)

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II. The distinction made by the judge on the trial is not made in any decided case. In Massachusetts and some other states, a suit may be brought upon the last day of grace after demand, wherever the note is payable, but in New York and several other states it cannot be so brought. The New York cases make no distinction as to where the note is payable. The demand in *Osborn v. Moncure* was made to comply with the Massachusetts cases which require it before suit brought on the last day of grace. (*See Parsons, cited above.*) It was of course unnecessary to charge the defendants who were the makers; and the fact that it was made at their counting house is not conclusive that the note was payable at large. In that case the plaintiff's counsel cited the Massachusetts cases, but the court refused to follow them. Chief Justice Savage, who delivered the opinion in *Hopping v. Quin*, (12 *Wend.* 517,) evidently did not hold that there was any such distinction; for he lays down the same doctrine in the *Bank of Utica v. Wager*, (2 *Cowen*, 766,) the note in that case being payable at the Bank of Utica. (*See that case at pages 712, 13.*) Edwards, in his treatise upon notes, makes no such distinction, and Parsons evidently does not suppose that the Massachusetts cases are the law in New York.

III. The reason of the Massachusetts doctrine is this: That the protest of the notes, demand of the maker and notice to the indorsers, fixes the liability of the parties, and a suit may at any time thereafter, and on the same day, be brought, (*Staples v. Franklin Bank*, (1 *Metc.* 43,) a reason which applies as well in the case of a note payable at large as at bank. The New York cases hold that the maker has the whole of the last day of grace after protest to pay. If the Massachusetts doctrine is right the New York cases are wrong. They cannot be reconciled. It would be productive of infinite mischief if the courts of the greatest commercial state in the Union should make the distinction attempted in this case, and practically makes notes payable at bank due one day earlier than those payable at large.

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By the Court, MASON, J. The only question presented in this case is whether a suit can be maintained against the indorsers of a note payable at a bank, and which has been duly protested, where the suit is commenced on the day of the protest, or the third day of grace. The rule in England, as understood by *Chitty*, is that the suit on the third day of grace is premature. (*See Chitty on Bills*, 406, 407, 409, 8th Lond. ed.) And such I understand to be the rule held in Westminster Hall. (*Castrique v. Bernabo*, 6 *Queen's B. R.* 498. *Lifferty v. Mills*, 4 *T. R.* 170.) The rule is so understood by *Byles*. (*See his late work on Bills*, p. 181.) In this country there is certainly considerable conflict of authority over the question, in the courts of the different states. The courts of Maine, New Hampshire, Massachusetts, South Carolina and some others have held that the suit could be commenced on the third day of grace, at any time after the close of banking hours and proper protesting of the note. (1 *Pick.* 401. 21 *id.* 310. 8 *id.* 414. 1 *Metcalf*, 43, 48. 4 *Greenl. Rep.* 479. 7 *N. Hamp. Rep.* 199. 8 *Foster*, 302. 4 *Humph.* 241. 5 *Shep.* 230. 31 *Maine Rep.* 580. 40 *id.* 62. 15 *id.* 67. *Wilson v. Williamson*, 1 *Nott & McCord*, 440.) While on the other hand the courts of Pennsylvania, Ohio, Illinois, Mississippi, Alabama and some others have held the suit prematurely brought if commenced on the third day of grace. (*Thomas v. Shoemaker*, 6 *Watts & Serg.* 179. *Walter v. Kirk*, 14 *Illinois Rep.* 55. *Wiggle v. Thomason*, 11 *Smedes & Marsh.* 452. *Beavan v. Eldridge*, 2 *Miles*, 353. *Randolph v. Cook*, 2 *Porter*, 286. 5 *Serg. & R.* 318.)

The rule in this state has long been regarded as settled that the suit commenced on the third day of grace was prematurely brought. The question came before the supreme court in *Hogan v. Cuyler*, (8 *Cowen's Rep.* 203,) when it was held to be premature to commence the suit on the third day of grace. The question was distinctly presented again in *Osborn v. Moncure*, (3 *Wend.* 170,) when it was distinctly held the suit could not be maintained, when commenced on

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the third day of grace. Chief Justice Savage regarded the rule so well settled with us, in this state, that he held in *Hopping v. Quin*, (12 *Wend.* 517,) that where an attorney commenced a suit upon a note on the third day of grace and was beaten and then brought suit against his client to recover for his services, he was not entitled to recover; and in speaking upon this question he says: "it was the duty of the plaintiff to have known that a suit could not be brought on the last day of grace; and his bringing such a suit must be imputed either to negligence or ignorance. In either case it lays no foundation for an action against his client, who has been the sufferer." There is no case in the courts of this state to the contrary of these cases, while all the elementary books have treated our law in this state as settled in conformity to these cases. Judge Cowen so regarded it when he wrote his treatise. (1 *Cowen's Tr.* 220, *ed.* 1844,) where he lays down the doctrine distinctly, that the suit cannot be maintained if commenced on the last day of grace. And so *Edwards* regards it in his treatise on *Bills and Notes*, (*see* pages 525, 526, 527;) and the rule in this state is so regarded by *Parsons* in his treatise. (*See* vol. 1, page 440, and also note i.) Chief Justice *Shaw* regards our rule in this state as different from theirs. (1 *Metcalf*, 54.)

The rule in England seems to have conformed to a general practice—the practice to postpone notice of the dishonor and other proceedings, till the day following—so that it has been regarded amongst merchants as a right to have all of the last day of grace in which to pay. In *Hartley's case*, (1 *Carr. & P.* 555,) Abbott, Ch. J. on a motion to show cause, said, "I think the notice of dishonor given on the day on which the bill is payable, will be good or bad as the acceptor may or not afterwards pay the bill. If he does not afterwards pay, on that day the notice is good, and if he does it of course comes to nothing." And *Byles*, in his late valuable treatise on *Bills*, page 131, says: "The acceptor of a bill whether inland or foreign, or the maker of a note, should pay

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it on demand made at any time within business hours on the day it falls due, and if it be not paid on such demand the holder may instantly treat it as dishonored. But," he adds, "the acceptor has the whole of that day within which to make payment, and though he should in the course of the day refuse payment, which entitles the holder to give notice of dishonor, yet if he subsequently on the same day makes payment it is good, and the notice of dishonor becomes of no avail." This is precisely as I understand the rule with us. Now if we admit that the courts of Massachusetts, Maine, New Hampshire, &c. have the better reason for their decisions, there is no such great principle involved in the case as would justify us in overruling our own cases and following theirs; especially so where we are supported by equal weight of authority on our side; and Parsons, who is an earnest advocate on the other side, admits that "there is strong reason for holding that a party bound to pay has the whole of the day of maturity." (*Parsons on Notes and Bills*, vol. 2, p. 460.) And our rule has certainly one advantage; it tends to uniformity in the law by conforming to the general rule with reference to all other contracts, which holds that when a day is appointed for the payment of money the payer has the whole of the day, down to the last moment, in which to tender the money.

It is proper to remark that none of the cases make any difference or distinction between the case of the maker or indorser. None can be made. As regards this question of the right to bring the suit, there is not and ought not to be any distinction between a note payable at bank and one payable at large, or at the counting house of the merchant; and none seems to have been recognized in this state. (2 *Cowen*, 766.) I know the general rule has been held, in regard to paper payable at bank, that it must be presented and a demand made within the business hours of the bank. This arises from the necessity of the case, as banks are generally shut after that hour and there is consequently an impossibil-

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ity of making the presentment and demand after that, and yet it is expressly held that a presentment after business hours, even in the evening, if there be any officer of the bank there to answer, is good. (*Garnett v. Woodcock*, 1 *Stark. R.* 475. *Bayl. on Bills*, 212, *Am. ed.* *Chitty on Bills*, 278. *Henry v. Lee*, 2 *Chitty*, 124.) And it was held by the court of dernier resort in this state, in the case of the *Bank of Syracuse v. Hollister*, (17 *N. Y. Rep.* 46,) that where a note payable at the Bank of Utica, where the maker had no funds and which was delivered after business hours on the last day of grace to the teller, who was also a notary, at his dwelling, for the purpose of demanding payment, and he went to the bank and being unable to obtain entrance demanded payment at the bank door, it was sufficient demand to charge the indorser. The rule therefore in regard to paper payable at bank is that the holder must make the presentment during business hours unless he can obtain admission afterwards and find a person authorized to answer, or in some other way can get a satisfactory answer from an officer authorized, as was done in the case of the *Bank of Syracuse v. Hollister*. Now as to the notice of the default of the maker which is required to be given to the indorser, there is certainly no reason in the world why any different rule should be applied to the case of notes or bills payable at bank than in the case of those which are payable at large, or at the place of business of the merchant. The same rule applies in regard to the service of the notice in either case, and the holder is under no obligation to serve the notice any earlier in the one case than in the other. And if he has a right to make an earlier service in the one case than in the other it should not deprive the maker of his day to seek the holder of the note, and by tendering payment save a suit. Now if no demand is made, all the cases hold that the maker has the whole day in which to pay. (31 *Maine R.* 580. 2 *Parsons on Notes and Bills*, 461, note 2.) And as there is no necessity or good reason for having one rule applicable to one class of paper and

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another applicable to another, I am for adhering to the rule as heretofore held in this state; and I fully agree with what was held by that learned and very able jurist, C. J. Gibson, in *Taylor v. Jacoby*, (2 Barr's Penn. R. 495,) that a note is not due, for the purpose of commencing a suit, until after the termination of the day of payment, although by commercial usage it may be demanded at a reasonable time of that day; that it falls under the general and well settled rule of law which rejects fractions of a day and which views the day as an indivisible point, and which gives to the maker the day and not a fraction of it. I am, for these reasons, in favor of granting a new trial; costs to abide the event.

New trial granted.

[BROOKS GENERAL TERM, JANUARY 26, 1864. *Campbell, Parker and Mason, Justices.*]

METCALF vs. CLARK and WILSON, executors &c.

Where a defendant, residing in Canada, was inveigled into this state by a trick, for the purpose of effecting a service of the summons upon him, the service of the summons and all proceedings dependent thereon, were set aside, and a warrant of attachment vacated.

Proceedings by attachment against executors are inapplicable for the purpose of compelling the settlement of the estate of the testator, or of enforcing payment by the executors of an individual demand contracted by the testator, where the executors are not charged with any breach of duty, except a neglect to pay the debt.

An ordinary action at law cannot be maintained, in this state, against foreign executors, as such, since the office of executor *de son tort* was abolished by statute.

But this objection to the action is matter of defense. It cannot be urged on a motion to set aside the summons.

ACTION to recover a claim amounting to over \$1300 against the estate of Matthew Clark deceased, the defendant's testator, for moneys collected by Clark in his lifetime,

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for the plaintiff, and which he had neglected to pay over. Clark, in his lifetime, resided in Canada, and the defendants, his executors, also resided there, and had assets. It appeared from the papers that on the 27th of May, 1863, one Freeman Nye, a resident of Lacolle, Canada East, who had been engaged in prosecuting the plaintiff's claim, sent word to the defendants to meet him at his store (situate in Canada and but a few feet from the boundary line between the United States and Canada) for the purpose of settling up the matters involved in this action; that the defendants accordingly went to the store of said Nye; and on their arrival, Nye stepped out and induced the defendant Wilson to hitch his horse under a certain shed adjoining the store; that said shed was situate just over the boundary line, in the state of New York; that Wilson did so hitch his horse in the said shed, whereupon one Booth, who was in the employ of Nye, served a summons upon him in this action. An attachment having been issued, the defendants, on affidavits showing the above facts, moved at special term to vacate the same, on the grounds that an attachment could not be issued against non-resident executors, to enforce a claim against them in that capacity; and that the summons was improperly served. The justice at special term made an order directing that the summons and complaint and warrant of attachment, and all proceedings subsequent thereto, be set aside with costs. From which order the plaintiff appealed.

D. J. Rich, for the appellant.

S. P. Hubbell, for the respondents.

By the Court, BOCKES, J. Appeal from an order granted at a special term, setting aside the summons, complaint, warrant of attachment and all proceedings herein.

We can have no doubt that the defendant, Wilson, was, through the instrumentality of the plaintiff, or of those acting

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in his behalf, inveigled into this state with the purpose of effecting service upon him of the summons in this action. He was enticed within the jurisdiction of the court for a purpose to which the court will not give its sanction. As was said in *Carpenter v. Spooner*, (2 Sandf. 717,) the proceeding was a trick for the purpose of giving to this court jurisdiction of the action. The service of the summons, and all subsequent proceedings in the action dependent thereon should therefore be vacated. (*Goupil v. Simonson*, 3 Abb. 474. *Stein v. Valkenhuisen, Ellis, Black. & Ellis*, 65. *Williams v. Bacon*, 10 Wend. 636. *Snelling v. Watrous*, 2 Paige, 314.) The order of the special term, however, if put on this ground, should have set aside the *service* of the summons instead of the summons itself. But this is, probably, of no great moment in this case.

I am satisfied that the warrant of attachment was unauthorized, and hence was properly vacated. Even if the plaintiff had a cause of action in this state, against the defendants as executors of Matthew Clark, deceased, the attachment was unauthorized. Proceedings against them to obtain an application of the property of the estate to the payment of the debts of the testator must be taken, and conducted in the same way as if letters testamentary were granted to executors in this state. Letters ancillary or auxiliary may be granted here in the case of foreign executors, when administration here becomes necessary. But in no case is a warrant of attachment authorized against executors. The property of the estate is trust property in their hands, and must be dealt with as such for the benefit of all having an interest in it. Proceedings by attachment are proceedings at law for the benefit of the individual claimant. An injunction may perhaps issue, in some cases, against foreign executors or administrators, with a view to the preservation of the trust property, but the action then must be one in equity, involving some unjust and unlawful proceeding in regard to it on the part of the executors or administrators. Proceedings by attach-

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ment are clearly inapplicable for the purpose of compelling the settlement of the estate of a deceased person or of enforcing payment by the executor of an individual demand contracted by the deceased, without charging the executors with any breach of duty except a neglect to pay the debt.

If I am correct in the above conclusions, the order of the special term was substantially correct. It probably, in strictness, should have been an order setting aside and vacating the *service* of the summons, and also subsequent proceedings in the action, including the warrant of attachment and proceedings thereon.

It seems to me, however, very clear that an ordinary action at law—which is this case, according to the facts presented on this appeal—cannot be maintained in this state against foreign executors as such. It has been for a long time the settled rule that a foreign executor cannot maintain an action here by virtue of his appointment abroad. (*McNamara v. Dwyer*, 7 Paige, 239. *Slatter v. Carroll*, 2 Sandf. Ch. 584. *Smith v. Webb*, 1 Barb. 230. 2 Kent, 432. *Lawrence v. Lawrence*, 3 Barb. Ch. 71. *Willard on Executors*, 162, 163. *Story on Conf. of Laws*, § 513.)

And I deem it equally well settled that an action *at law*, as distinguished from an action in equity, cannot be maintained in this state against a foreign executor or administrator. This was so expressly decided in *Vermilya v. Beatty*, (6 Barb. 429.) This point is considered in a note to Kent's Commentaries, (2 Kent, 431, 2, note c,) where it is said that the general rule in England and in this country is, that letters testamentary, or of administration, granted abroad, give no authority to sue or be sued in another jurisdiction, though they may be sufficient ground for new probate authority. The authorities both in England and in this country are there cited. So it was held, in *Campbell v. Tousey*, (7 Cowen, 64,) that an executor or administrator, appointed in a neighboring state, could not be sued *as such*, here. The action was maintained in that case, however, inasmuch as the de-

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fendant was shown to be an executor *de son tort*; that is, he was an executor, here, *de son tort*. As was said by Edwards, J. in *Vermilya v. Beatty*, he was held liable here, not as a foreign executor, but as an executor in this state by reason of his acts here. But the office of executor *de son tort* is now abolished. (2 R. S. 449, § 17. *Babcock v. Booth*, 2 Hill, 185. *Willard on Executors*, 140.)

Judge Story declares the rule as stated in *Vermilya v. Beatty*, and in the note to Kent's Commentaries, above cited. He says no suit can be maintained against a foreign executor or administrator, as such, in the court of any other country except that from which he derives his authority to act, for he has no positive right or authority over those assets situated elsewhere, and can only be held there to answer for his acts in regard to them. We are referred to three cases where actions have been maintained in this state against foreign executors or administrators. (*Campbell v. Tousey*, 7 Cowen, 64. *McNamara v. Dwyer*, 7 Paige, 239. *Gulick v. Gulick*, 33 Barb. 92.) The first of these cases was an action at law, and was maintained, as I have above suggested, on the ground that the defendant had made himself responsible here as an executor *de son tort*, which office has since been abolished by statute. And in that case it was held that the defendant was not liable to be sued in this state by virtue of his foreign appointment. In *McNamara v. Dwyer* the action was an equitable one, and was sustained because of its equitable character, and the chancellor there expressed a doubt whether the defendant could be called on to answer here in a court of law. So the action was maintained in *Gulick v. Gulick*, on the strength of the decision in *McNamara v. Dwyer*, as an action in equity. The case of *Slatter v. Carroll*, (2 Sandf. Ch. 573,) was also an action in equity, and was maintained on the principle of the decision in *McNamara v. Dwyer*. I am not cited to any case where an action has been maintained against a foreign executor, except on an allegation of such facts and circumstances as would constitute the action

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one in equity, as distinguished from an action at law, simply for the recovery of money. It was said in *Brown v. Brown*, (1 Barb. Ch. 189,) that the case must be a special one, to be shown by the bill, before the action could be maintained. But this objection to the action is matter of defense. It cannot be urged on a motion to set aside the summons. It is a matter to be pleaded, as to which an issue may be found, to be tried as an issue in the cause. The order appealed from is substantially correct. The only tenable objection to it is formal merely. It should have been an order setting aside the service of the summons and all subsequent proceedings, and also to vacate the warrant of attachment. With this modification the order should be affirmed. And inasmuch as the merits of the motion as urged and discussed by counsel are found to be with the defendants, they should have the costs of the appeal.

With the modification above suggested the order appealed from must be affirmed, with ten dollars costs of appeal.

[SCHENECTADY GENERAL TERM, JANUARY 5, 1864. *Potter, Boakes and James, Justices.*]

MALCOM G. MCNAUGHTON and others, *appellants*, vs. JOHN MCNAUGHTON, executor &c., and others, *respondents*.

Under the provisions of the revised statutes a will, whether it disposes of real or of personal property, speaks as of the time of the testator's death.

Where a testator devises all his real estate, in express and unambiguous words, he will be deemed to have reference to the real estate as it shall exist at the time of his death.

G., being the owner of a farm, and certain personal property, made his will, giving and bequeathing to his wife all his personal estate. He then gave, devised and bequeathed to his wife "all his real estate" during her life, remainder over to others. He subsequently sold and conveyed the farm to L., taking back from the grantee a bond and mortgage for a part of the purchase money, which he held at the time of his death. *Held* that the bond and mortgage passed to the widow of the testator, as part of the person-

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alty; it being the intent of the testator that the devise should operate only on the real estate of which he should die seised.

Held, also, that if the devise were to be regarded as a devise of the farm—in effect a specific devise—then the sale and conveyance was, to that extent, a revocation of the will.

APPEAL from a decree of the surrogate of Washington county, made upon the accounting of the executor of Isaac Getty, deceased. The facts are sufficiently set forth in the opinion of the court.

James S. Coon and C. F. Ingalls, for the appellants.

M. Fairchild, for the respondent.

By the Court, BOCKES, J. This is an appeal from an order and decree of the surrogate of Washington county.

On the 27th January, 1842, Isaac Getty made a last will and testament by which he gave to his wife, Jane Getty, all his personal estate, to be for her use and at her disposal. He also gave and devised all his real estate to his wife during her natural life; and on her decease he directed his real estate to be sold and the avails divided among his nephews and nieces. He appointed M. McNaughton, the respondent, executor, to whom letters testamentary were issued on his decease.

When the will was made, (1842,) the testator owned a farm which, on the 7th of April, 1855, he conveyed away, taking back from the grantee a bond and mortgage for \$2800, part of the consideration of the conveyance.

At the time of his decease, which occurred about the month of February, 1856, he held this bond and mortgage, with some other personal property, but no real property except a village lot.

On an accounting before the surrogate, that officer held that the bond and mortgage belonged to the personal estate, and passed under the will to the testator's widow, and entered an order and decree to that effect. From this order and

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decree the nephews and nieces of the testator appealed, and demand its reversal.

The intention of the testator is the first point of inquiry, when called on to give construction to a will: and when the intention is determined, it must be carried out if consistent with the rules of law. In this case the will is in no respect ambiguous. It must therefore be taken to express the purpose of the testator, which must be collected from its plain and unequivocal terms. It must, too, be deemed to express his will and purpose at the time of or immediately preceding his decease. So it is said that a will speaks at the time of the testator's death, until which time it is ambulatory. A will of personal property was, by the common law, deemed to take effect on the death of the testator, and operated on whatever personal estate he then had: but a devise of real property operated on such only as the testator had at the time of the execution of the instrument. A devise of lands was supposed to resemble a conveyance, and was therefore held to operate only on such real estate as the testator had at the time of making the will. But this rule of construction of wills of real estate has been changed by statute, both in England and in this country. Our statute now ordains that "Every will that shall be made by a testator in express terms of all his real estate, or in any other terms denoting his intent to devise all his real property, shall be construed to pass all the real estate which he was entitled to devise at the time of his death. (2 R. S. 57, § 5.) Chancellor Walworth, in speaking of this statute, remarks: "This statutory provision proceeds on the ground that in a general devise of all his real estate, the testator had reference to the real estate as it shall exist at the time of his death; and that such a construction of the testamentary disposition of his property will be but carrying his intention into effect." (*Pond v. Bergh*, 10 Paige, 140, 149.) Judge Cowen says, in *Van Cortlandt v. Kip*, (1 Hill, 590, on page 596,) "the section cited does indeed declare that a devise in any form denoting an intent

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to pass all a man's real estate shall now be construed to pass all the real estate devisable by him at the time of his death. In this respect it speaks at the same time as a will of personalty." So Judge Brown, in *Ellison v. Miller*, (11 Barb. 332, 334-5,) when alluding to the difference of construction formerly existing between a will of personalty and a devise of real estate, says: "the present statute has however taken away this distinction, and it gives to words which denote the testator's intention to devise all his real property the same effect as is given to words of similar import in respect to personal property." In *Brown v. Brown*, (16 Barb. 569-574,) Judge Allen says: "the section just quoted does away with all distinction between real and personal estate, and the intent of the testator governs in both cases;" and he held that the will spoke at the decease of the testator in regard to the real estate devised by it. Judge Willard remarks, (*Willard on Executors*, 58,) "A will of personal property speaks from the death of the testator; a devise of real estate formerly spoke from the date of the devise. But now by statute both speak from the same point of time, the death of the testator."

The will is clear and specific in its language. It must therefore receive construction according to the fair import of its terms. The testator devises all his real estate in express and unambiguous words. In such a case Chancellor Walworth says, the testator must be deemed to have reference to the real estate as it shall exist at the time of his death. He must be considered as knowing the law, and his plain words must have their appropriate signification.

Allowing the will to speak as of the time of the decease of the testator, as well in regard to his real as his personal estate, there can be no question but that the bond and mortgage passed to Mrs. Getty, as part of the personalty.

It is urged that the will in effect was as a bequest of money; that it operated as an equitable conversion of the land into money or personalty. But if the will did not take effect until the decease of the testator, as we have seen it did not, then

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it did not operate on the lands which had been previously conveyed by him. As to such lands the case was the same as if he had never owned them.

Nor need we here discuss the question of revocation. As we construe the will, it was the intent of the testator, as in the will expressed, that the devise should operate only on the real estate of which he should die seised.

It seems very plain, however, that if the devise is to be regarded as a devise of the farm—in effect a *specific devise*—then the sale and conveyance was to that extent a revocation of the will. (7 *Paige*, 97. 26 *Barb.* 416. 9 *id.* 35. 16 *id.* 569. 7 *id.* 174. 2 *Bradf.* 413.)

The order and decree of the surrogate must be affirmed, with costs.

[SCHENECTADY GENERAL TERM, JANUARY 5, 1864. *Potter, Boeker and Jones*, Justices.]

SHELDON, receiver of the Columbia Insurance Company, *vs.*
ADAMS.

THE SAME *vs.* WHITBECK & JONES.

THE SAME *vs.* DANIELS & HITCHENS.

THE SAME *vs.* STARBUCK.

An order of a special term allowing a complaint to be amended by inserting therein an entirely new and different cause of action, which will require a different defense, involves the merits, and affects a substantial right, and is therefore appealable.

In exercising the power of allowing amendments "in furtherance of justice," no discrimination should be made, by the courts, between legal defenses offered to be set up, on account of their character. All defenses recognized by statute as being such—including those styled unconscionable, such as the statute of limitations, usury &c.—stand upon an equal footing in this respect.

A party has a vested right to set up those defenses as well as any other, when they have become perfect.

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Where promissory notes, given to an insurance company, have been sued upon as premium notes assessed, the complaint will not be allowed to be amended—after the notes have become outlawed, as stock notes—by inserting therein an additional claim and count upon them for the whole amount thereof, as stock notes given before the organization of the company and as constituting a part of its capital; the effect of which amendment would be to cut off the defense of the statute of limitations.

Nor will an amendment be granted by which a note liable to be assessed only for losses in one class of hazards, is permitted to be sued on as a stock note, and made liable for all losses.

An amendment of the complaint, not moved for until after eight years have elapsed since issue joined, nor until after the death of the original plaintiff, and the defendants' attorney, should not be granted, without sufficient excuse being shown.

THESE are severally appeals from orders made at special term, substituting Frederick A. Sands, receiver, as plaintiff, and with liberty to the plaintiff to amend the summons and complaint respectively, by inserting therein in respect to the notes which had been severally sued upon as premium notes assessed, an additional and further cause of action or count and claim upon the same notes for the whole amount of said notes as stock notes, given before the organization of the company, and as notes constituting a part of the capital of the company. The other facts in the case will sufficiently appear in the opinion.

G. M. Harwood, for the appellants, defendants.

H. R. Mygatt, for the plaintiff, respondent.

By the Court, POTTER, J. The first question that arises is, whether the order of the special term is appealable. The actions were commenced in the spring of 1854. The complaints were verified by the then plaintiff. The notes are set forth in the complaint as notes made *subsequent* to the organization of the company as premium notes given for policies of insurance, to be issued thereon. The notes are such in form, that is, premium notes. Sheldon, the receiver, as such, under the direction, sanction and authority of the su-

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preme court, settled and determined the amount of losses of the company, and the proportions to be assessed upon the said notes against the defendants for their proportions of losses and liabilities against the defendants as members of the said company by reason of the notes; and he alleges that he did assess the notes the sums and proportions against the defendants that are therein sued for, and gave them due legal notice thereof, and then sets forth that the risks and business of the company were divided into two departments, "The Farmers' Department," and "The Merchants' Department;" that the risks taken in each of these departments were by the charter of the company, to be liable in no other department, and then alleges particularly in which of said departments the notes were severally made. The notes are dated in 1851. The actions have never been brought to trial. Now, in September, 1862, more than eleven years after the date of the notes, an order is granted, authorizing the plaintiff to insert in his complaint, an entirely different cause of action, and presenting entirely different questions for litigation. The power to do this is claimed under the 173d section of the code, "*for the furtherance of justice,*" and it is now claimed that when this has been adjudged by a court, it is but the exercise of a discretion, and cannot, and will not be reviewed. The right of appeal exists in all cases from an order of a special term, or a judge, "when it involves the merits of the action, or some part thereof, or affects a substantial right. (*Code* § 349, *sub. 3.*) To say that an entirely new and different cause of action, inserted in a complaint eight years after issue joined, requiring a different defense, does not affect a substantial right, or involve the merits, cannot be allowed; both reason and authority are against this idea. An appeal lies from such an order. (*St. John v. Croel*, 10 *How. Pr. Rep.* 253. *Harrington v. Slade*, 22 *Barb.* 161.) The amendment, in its nature, is based upon the doubt whether the plaintiff can recover upon his complaint as it is, or, can recover but a part of the amount. He now desires (and the amendment is to

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allow him to carry out that desire) to recover either a larger sum, or for a different cause of action. This, clearly, affects a substantial right. The merits of the motion must then stand upon its being granted "*in furtherance of justice.*" If it cannot stand upon this ground, it should be reversed. Let us see how it looks in this view. It is now the settled doctrine of the court of appeals, that in allowing amendments, no discrimination should be made, in the exercise of that power, between legal defenses offered to be set up, on account of their character; that is, whether they are such as have sometimes been called unconscionable; as the statute of limitations, usury, &c. or otherwise; that is to say, all defenses recognized by statute to be such, are in this regard to stand equal, and that it is not the duty of courts to make discrimination against the spirit of a statute. In other words, that a party has a vested right to set up these defenses as well as any other, when they have become perfect; and the statute of limitations has been approvingly called by distinguished jurists "the statute of repose." (8 Cowen, 615. 22 Barb. 164, 5.) The notes in question, if they were original stock notes, made for the organization of the company, as they bear date in 1851, had become outlawed as such, and no action could be maintained upon them if the defense of the statute of limitations should be interposed. By the effect of this order, these outlawed notes are put into a complaint in an action brought in 1853, and as if sued on then, and thus cut off the defense of the statute of limitations; and this is claimed to be "*in furtherance of justice.*" They had been so outlawed four years when the order appealed from was granted. (*Bell v. Yates*, 33 Barb. 629. *Howland v. Edmonds*, Id. 433, reversed in the court of appeals.) By this order, these notes put to their repose by statute, and to which if sued upon directly, the defendants could interpose a perfect legal statutory defense, are, by the exercise of this power at special term revived against the defendants, without the promise or acknowledgment by the defendants in writing, as required by section 110

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of the code ; and is in effect to give the plaintiff the right to commence this action by *an order*, without commencing it by summons and complaint, as is required by section 127 of the code. Not *only* that ; but a note which by the company's charter, and which by the defendant's policy, it is made a condition in his contract, that it shall only be assessed for losses in one class of hazards, is permitted to be sued on as a stock note and made liable for all losses. These are extraordinary favors, certainly, to be conferred upon a plaintiff who has now awakened after an eight years' slumber upon his case ; and it is in effect, by indirection, extending the provision of the statute of limitations, from six to ten years, against the vested rights of the defendants. This is too great an exercise of power to be accomplished by one order ; yet we see that all this it is claimed now, was done "in furtherance of justice," and therefore not to be reviewed. We do not see it in that light, and it is not probable that the point was presented to the learned justice at special term. But without reference to the absolute *injustice* to the defendants, which would result from the order appealed from if permitted to stand, the papers used upon the motion show a decided preponderance of weight, I think, against the granting of the motion upon the facts. Sheldon, the receiver, who lived at the place of location of this company—the place where its officers resided—where its office of business was kept ; who was appointed receiver two years after the organization of the company, and who must be presumed from his examination of the books, vouchers and notes of the company, made in order to the proper assessment upon premium notes, and which assessment he did make while in the possession of all such advantages, himself verified the complaint in April, 1854, which states the notes to be premium notes, made to be liable in only one of its departments, and made *after* the organization of the company. Against this quite full and satisfactory evidence, we have only the statement of the present attorney of the present receiver, who resides at Oxford

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Chenango county, made in July, 1862, more than eight years thereafter, who states that he has investigated the affairs of said company, and endeavored to ascertain whether said notes were "capital stock or premium notes, *and that this deponent cannot determine and does not know whether the said notes are capital stock or premium notes.*" Indeed, there is no ground of merit at all, or a reason for the order, even had it been moved for in twenty days after issue joined. This is not improved by waiting eight years, and until after the death of the first plaintiff, and of the defendants' attorney. Such laches should be discountenanced. The excuse offered is not sufficient at any time. We do not intend to reason against the propriety of having two counts in a complaint upon the same instrument, which may even appear to be inconsistent with each other, if necessary to attain justice, or to meet a possible or contingent variance in the proof on the trial. *Birdseye v. Smith*, (32 Barb. 217,) is not in conflict with our views, but we mean to say, if after issue joined, the party desires a favor by way of amendment, he must show a strong reason; and if he desires to thus get before the court *indirectly* a cause of action that he could not recover upon directly, the courts should refuse his application.

The order in each of the cases appealed from, except so much as substitutes Frederick A. Sands as plaintiff, should be reversed, with ten dollars costs, and disbursements in each, and with ten dollars costs in each for opposing the motion at special term.

[CLINTON GENERAL TERM, May, 5, 1863. *Potter, Books and James, Justices.*]

SMITH vs. GAGE.

A testator, by his will, gave and devised to J. L. all those parts of certain lots of land in Clinton and Franklin counties (describing them) "which remain unsold or not conveyed by me at the time of my death; *and also all contracts which may have been entered into for the sale of any of the said lands, and which have not been fully paid up, and all moneys which may remain due and unpaid on such contracts*; and I direct the said J. L. to carry out and perform all such contracts, upon the purchaser's complying with the terms thereof." *Held* that the testator intended to give the land as land, and the contracts as contracts, with a direction to J. L. to hold the title in trust and to execute deeds. And that such contracts were that species of property which the law stamped upon them, viz. personal property; their character not being changed by any thing in the phraseology of the will.

Held, also, that the death of the testator severed the title of the real from the personal estate, in the lands and contracts; the title to the real estate going directly to the devisee, and the title to the personal going directly to the personal representative.

Held, further, that a judgment recovered against the devisee, prior to the death of the testator, and docketed subsequently to his death, became a lien upon the real estate so devised; but that the judgment creditor could only secure his claim upon the personal estate through the instrumentality of an action in equity in the nature of a creditor's bill, or otherwise, in order to reach the unpaid money due on a contract, then remaining a mere chose in action in the hands of the executor.

That J. L. had no such interest in the lands embraced in a contract for the sale thereof, which had been executed by the testator, as to make them subject to the lien created by the docketing of a judgment against J. L.

That J. L. took such contract only as personal estate; and that the personal property thus coming to him did not merge in, or attach to, the title to the real estate held by him in trust.

That the obligation of the vendee, in such a contract, to pay, was assignable, and was severable from the trust to convey.

And the vendee having complied with the terms of his contract, and received a conveyance of the premises from J. L. in execution of the trust created by the will; *Held* that he was entitled to hold the land, as against one claiming under a judgment docketed against J. L.

The case of *Moyer v. Himman*, (17 Barb. 189,) which holds that a judgment regularly docketed against the vendor of lands by an executory contract is a charge upon the land and binds the legal title, is not well supported by authority. (*See S. C. 18 N. Y. Rep. 180.*) *Per* PORTER, J.

After the vendee in an executory contract has perfected his title to lands in pursuance of it, an action of *ejectment* will not lie against him by a grantee

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of the sheriff by deed under a judgment against the devisee of the vendor, docketed subsequent to such contract, though such judgment was docketed while a portion of the purchase money remained unpaid, and before the vendee received his deed.

THIS action was brought to recover the possession of real estate, and was tried before Justice BOCKES in March, 1862, without a jury. There was no question of fact in the case, to be considered. The exceptions are only to the conclusions of the judge upon his findings of fact. The plaintiff rests his right to recover upon a deed from the grantee of a sheriff, at a sale by him of the interest of John Lamb, under a judgment obtained in the superior court of New York, December 5, 1850, docketed in Franklin county, on the 17th of August, 1855, for \$8925.29. The sheriff's sale was made 21st of February, 1856. One Theodore Hinsdale was the purchaser of all the real estate in this patent, under this judgment, and took the sheriff's deed thereof, which included this property. Hinsdale and wife conveyed to the plaintiff the property he so purchased, including the premises in question. The plaintiff, before action, gave notice to the defendants of his claim of title, and demanded the possession. This was the plaintiff's case, except that in order to show title in John Lamb, he produced the will of Anthony Lamb, (who it was conceded was the source of title,) in which is the following clause: "I give and devise to my son John, and to his heirs and assigns forever, in fee simple, all those parts of lot No. 67, of township No. 6, of the military tract, in the county of Clinton, in the state of New York; and also all those parts of lots Nos. 22, 76, 77 and 82 of township No. 7, of said old military tract, in the county of Franklin, in said state, *which remain unsold*, or not conveyed by me at the time of my death; and also *all contracts* which may have been entered into for the sale of any of said lands, and which may not have been fully paid up, and all *moneys which may remain due and unpaid on such contracts*; and I direct the said John to carry out and perform all such

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contracts, upon the purchaser's complying with the terms thereof." Anthony Lamb died 13th of May, 1855. The defendant Samuel Gage, in his defense, showed an executory contract from Anthony Lamb to him for the sale of the premises in question, dated 5th November, 1851, by which contract Anthony Lamb agreed, on condition that Gage, his heirs &c., fulfilled the conditions and covenants therein specified, to execute to him, Gage, a warranty deed of the premises. The sixth condition thereof was that Gage was to pay \$500 for the premises; \$200 down and \$300 in four equal annual installments, with interest annually. Gage paid \$200 down, and \$50 on the 25th September, 1854, thereafter. There were also other covenants in the agreement on the part of Gage, to cultivate, improve, &c. He entered into immediate possession—improved the land—cleared up about thirty acres; built fences and erected a house and log barn. Some of the land is in meadow, and some is plowed. The other defendant, Elijah C. Gage, works the farm, and supports Samuel, who is now eighty years old. John Lamb, on the 12th September, 1835, assigned the several *contracts* made by his father for the sale of lands, including the contract made by his father with Samuel Gage, to one Timothy P. Richards, who by an assignment, dated 15th April, 1859, transferred the same to George C. Lamb. John Lamb, by another assignment made on the 15th April, 1859, assigned this *particular* contract separate from the others, to George Lamb, who, on the 25th June, 1859, assigned the same to one Manly B. Boardman. These assignments were on the back of the original agreement, made by Gage with Anthony Lamb, for the sale of the premises, and purported to transfer the *moneys* due and to become due thereon, and authorized the assignees to sue for and recover the same. John Lamb, on the 12th July, 1859, executed a deed to Samuel Gage of the premises described in said agreement, which deed recited the making of the said contract, and the several assignments thereof, also the last will and testament of his father, An-

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thony Lamb, so far as it related to said contract. On the same day, and at the same time and place, Samuel Gage, the defendant, and wife, executed to Boardman, the holder of the said contract, a bond and mortgage upon the same premises for the payment and security of \$436.54, the sum due upon the said contract on that day, for principal and interest. By the will of Anthony Lamb, he appointed executors thereof. This, upon the facts, was the defendants' case. The remaining facts sufficiently appear in the opinion.

J. B. Flanders, for the plaintiff.

B. Swinburne, for the defendant.

POTTER, J. The first question, I think, to be examined in proper order is: Was the interest which John Lamb took in the contract in question, under the will of Anthony Lamb, real or personal estate? But for the labored and elaborate argument on the part of the plaintiff to prove it to be a devise of real estate, I should not have supposed that such was the law, or that such a construction could be claimed. The provisions of this will, in its terms, are certainly clear and intelligible. There is neither latent or patent ambiguity in its language to be explained. In such a case I understand the rule is, that the words are to be used in their ordinary sense, and so that every word and expression shall have some meaning, and each word its full and proper effect; that where a testator thus uses plain and intelligent, or even technical words, he is presumed to employ them in their ordinary, natural and legal sense, unless the context clearly indicates the contrary. In the absence of ambiguous language, there is no occasion to ask the court for any construction as to the testator's intent. That intent is deemed to be such as the legal effect of the language would make it. The language of the clause in the will in question, it appears to me, clearly expresses, in apt and appropriate words, a gift and devise, and an intent to

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give and devise in regard to those lands, two kinds of property; and he has left the character of each kind to the determination which the law confers upon it. He gives and devises, *First*. "All those parts of certain lots of land in certain military tracts, in Clinton and Franklin counties in this state, [describing them] *which remain unsold or not conveyed by me at the time of my death.*" About the character of the estate in this portion of the devise, no doubt arises; and it is not in question here. Unsold lands are real estate, and pass directly to the devisee, not subject to the control of the executor. *Second*. The testator then adds, "*And also, all contracts which may have been entered into for the sale of any of the said lands, and which have not been fully paid up.*" Whatever may be the character of *this* property, clearly it includes the contract in question. A part of the purchase money had been paid, but it had not been fully paid up. As *lands* the testator limited the devise to such as *remained unsold, or not conveyed*. Under the *first*, he designated the property as *lots*, under the *second* as *contracts*. Then, according to the rule of giving every expression full effect, he gives or devises another kind of property, to wit, "all contracts which may have been entered into for the sale of any of said lands, and which have not been fully paid up." In terms he has *distinguished* this kind of property from the other. There can therefore be no doubt that the *contract* in question passed under *this* clause, and not under the former, whether it be a gift of real or of personal estate. But the testator still adds, as if for some further explanation of the reason of using different language in bequeathing the latter, or to remove all doubt as to the effect of giving under the term "*contracts*," these words: "*And all moneys which may remain due and unpaid on such contracts.*" These latter words are a gift of money, and are evidence of a design to give it as money; and as money it also includes the property in this contract, and helps to explain what it was that the testator intended to give under the word *contracts*, thus giv-

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ing the word *moneys* a meaning. If this was intended to be real estate, these words "*all moneys*" must be excluded as useless and have no effect. And were it still possible that any thing could be wanting to show that the testator himself intelligently understood the character of the property he was thus disposing of, and what was necessary should be done by John, he finally adds words creating a trust, or power in trust, to John, as follows: "And I direct the said John to carry out and perform *all such contracts*, upon the purchasers complying with the terms thereof." How to comply? By paying the money due. I confess that I have been entirely unable, from this reading of the will, to discover the *intent* of the testator to be as claimed, or to stamp upon this portion of the property any other character than that which the law gives to it. On the contrary, the language of the will forbids any other construction. The testator gave no direction or intimation that he desired these contracts to remain, or be invested in lands, so as to preserve it in that character. If the testator had intended to give John "all the real and personal estate" relating to those lands, it would doubtless have been briefly and more appropriately expressed in those words. It seems to me from the language so carefully employed, that he intended to give the *land* as *land*, and the *contracts* as *contracts*, with direction to John to hold the title in trust, and to execute deeds. Thus reading the will, there is no confusion, and no occasion to ask for any construction of language; it construes itself by the rule of common sense. Given as a contract, what is to be received from it is money, and Story says: "the law presumes the property shall assume the very character of the thing into which it is to be converted, whatever may be the manner in which that direction is given." (*Story's Eq. Juris.* § 791.) These contracts are, then, precisely that character of property which the law stamps upon them; and this character has not been changed by any thing in the phraseology of the will. What is that character? In *Lewis v. Smith*, (5 *Selden*, 502, 510,) such

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property was held to be personal estate. Denio, J. therein uses the following language: "The land had been sold by the testator in his lifetime, and his interest at the time of his death was the right to the money due upon the contracts, and was *personal estate*." The question arose in that case upon the *devise* to the wife for life, of the whole of the testator's property, real and personal, among which were contracts like the present for the sale of lands. This might be regarded as sufficient authority, being the decision of the highest court in the state, recently declared: nor is this new doctrine. To the same effect is *Moore v. Burrows*, (34 Barb. 173;) *Adams v. Green*, *Id.* 176;) 1 *Jarman on Wills*, 147; *Story's Eq. Juris.* §§ 1212, 1214, 789, 790, 792; *Champion v. Brown*, (6 John. Ch. 398, 402;) *Atcherley v. Vernon*, (10 Mod. R. 528;) *Patterson v. Moore*, (3 Atkyns, 272;) *Griffith v. Beecher*, (10 Barb. 434; 18 *id.* 83.) I have no hesitation, therefore, upon these authorities, in saying that the contract in question to the beneficiary under the will was personal estate. In whom, at the death of the testator, is the title to personal estate? It is unnecessary to cite authorities to show that from the moment of the death of the testator the title to all the personal estate vests in the executor; and though he may not *act generally* till probate, yet when probate is had, the title relates back to the death of the testator. By the mere operation of law, which no court can control, the death of Anthony Lamb severed the title of the real from the personal estate in these lands and contracts. The title to the real estate going directly to the devisee, and the title to the personal going directly to the personal representative. By the subsequent docketing of the judgment in question it became immediately and directly a lien upon the real estate so devised, but the judgment creditor could only secure his claim upon the personal estate through the instrumentality of an action in equity in the nature of a creditor's bill or otherwise, in order to reach the unpaid money due on the contract, then remaining a mere chose in action in the hands of the execu-

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tor, subject, first, to the payment of the testator's debts, and to the expenses of administration.

Is it at all doubtful that had the executor needed these choses in action to enable him to pay the debts of the testator, he could have collected the moneys due thereon, and have thus applied them? Will it be claimed that he must have applied to the surrogate for permission to sell these contracts as real estate? I think not. Subject to this claim of the executor, the law had furnished the creditor with an appropriate remedy by action to reach the balance. The title to this chose in action—this executory contract—thus coming by operation of law to the personal representative, it is separated from, and unaffected by the trust to convey the title. The executor held this personalty without any interest whatever in the land, and without any privity or reciprocal obligations with the trust to convey, or with Gage, the vendee, but that of creditor and debtor; unless it be that he takes also the equitable lien upon the lands by virtue of the contract, by which he may secure the payment of the balance due thereon, which he may enforce by a suit in equity. (*Sanders v. Aldrich*, 25 Barb. 71.) This case just cited, is authority also to show, that there may be a severance by the act of the parties to such an executory contract, as well as that by operation of law; the obligation to pay, by the vendee, is assignable, and is severable from the trust to convey. But if the construction of the language of the will made it doubtful in the law of equity, to which character of property, real or personal, it belonged, no one will deny, says Story, "that it is competent for the owner of the fund to make the land money or money land at his sole will and pleasure." (*Equity Juris.* § 791.) John Lamb, the owner of the property so bequeathed, did exercise his option in this regard, by assigning it as personal property. How then, at this period of time in this case, stood the legal relations of the parties to each other? As such we are now to examine it. Unrestrained by judicial interference, and unaffected by the equities which may here-

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after he noticed, Gage, the vendee and defendant, was under the legal obligation to pay the moneys due upon his contract to the legal owner and holder thereof. The contract required him to pay it to Anthony Lamb, his heirs, executors, administrators or assigns. This contract, by a succession of assignments, commencing with John Lamb, the devisee or legatee, on the 2d of September, 1853, was regularly, and as appears legally, transferred until it came to the hands of Manly B. Boardman, on the 25th of June, 1859, who then held the same as the assignee thereof. The possession of the contract by John Lamb, the devisee or legatee thereof, on the 12th of September, 1855, with the title given by will, is presumptive evidence that he had received it from the hands of the executor. The assent of the executor is necessary to the due vesting of the title in the legatee. (*Dayton's Surrogate*, 411.) John Lamb could take it from the executor only as personal estate; and each succeeding assignee took the same title from him. The personal property thus coming to John Lamb would not merge in, or attach to, a title to the real estate he held in trust. How then stood the rights of the parties to the contract, that is, the vendor and his assigns, and the defendant? John Lamb, by the provisions of his father's will, took the contract, and also took the legal estate in trust, or as a power in trust, to convey the said lands to the vendee in the contract, in terms as follows, to wit: "I direct the said John to carry out and perform all such contracts upon the purchasers' complying with the terms thereof." This trust remained wholly unaffected by the assignment of the contract or promise. John Lamb had previously disposed of the contract, that is the promise to pay and the moneys due thereon, without covenants or liability over, at the risk of the assignee. The terms as to him (John Lamb) had been complied with; and on the 12th of July, 1859, he executed this trust, by conveying as directed in the will, to Samuel Gage, the defendant, the title to the premises in question. The defendant, Samuel Gage, had complied with the terms of his contract; and he

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was entitled to the deed. As to him, there was no equitable lien upon his land when he had paid the purchase money; and Manly B. Boardman took a mortgage from the defendant Gage, to secure \$436.54, the amount due on the said contract on that day. A defendant may show as a defense to an action of ejectment brought by a purchaser at a sheriff's sale, that the interest of the judgment debtor was of such a nature that it could not be sold on execution, and that the plaintiff acquired nothing by the deed from the sheriff. (*Colvin v. Barker*, 2 Barb. 206.) Thus stood the legal rights of the defendant Samuel Gage, as they were presented on the trial. How then is it shown that the plaintiff has made out a legal title to these premises authorizing a judgment in his favor? If, as it has been contended, this contract and the money due thereon was a devise of real estate, by reason of the direction to John Lamb to convey the title when the money was paid, it was held in this same case, when before us on a former occasion, per ROSEKRANS, J. "That a devise of lands which the testator has contracted to sell, the possession of which the vendee is entitled to, as well as to the rents and profits thereof, when the devise is accompanied with a direction to the devisee to convey the lands upon the vendee's paying the purchase money, does not transfer the title to the devisee, under our revised statutes." And to this was cited 3 R. S. 5th ed. p. 15, § 49; p. 16, § 55; p. 21, §§ 77, 78. It only creates a special power. (*Id.* p. 24, § 98, sub. 1.) A power in trust. (*Id.* p. 25, § 115, sub. 1, 2.) This is now the law of this case in this court. If then this devise was of real estate, it was a trust estate, or a power in trust for the *cestui que trust*, and to which a lien of a creditor by judgment against the trustee, would not attach; and if it was a bequest of *personal* estate, as we think, it is not susceptible of being affected by the lien created by the docket of a judgment. It is insisted that our revised statutes do not make this kind of contracts *assets*, which go to the executor, inasmuch as the provisions of the statute do not specifically embrace them.

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(3 *R. S.* 5th ed. 169, § 6.) And that the maxim *expressio unius &c.* excludes them by construction from being that character of property. It is to be remarked that statutes in derogation of the common law are to be strictly construed in this regard; and the common law is not abrogated by mere implication, when both the common law and the provisions of the statute may exist without being repugnant. But the maxim cited, when applicable, applies only to presumptions. *Broom*, in his *Commentaries on Maxims*, 506, says, that "great caution is always requisite in applying this maxim." There is nothing in the words of this statute from which it can be *inferred*, that it was *intended* to change the common law in this particular; but on the contrary, the eighth section of the same act expressly preserves all common law rights from being *impaired* by the prior sixth section; besides, it is a mistake of the counsel to suppose that the sixth section of the statute does exclude this character of property by the omission supposed; true, it does not by that particular specification name "*contracts for the sale of land.*" But such contracts are, undeniably, "*things in action.*" By *that* designation, which is a general term for all contracts, they are specifically mentioned in subdivision 8 of section 6 of the statute referred to. I think this point is not therefore well taken. The remaining point, in fact the only point under which the plaintiff claims to have made title, starting with the assumption that this devise is real estate, is section 4 of 2 *R. S.* 359, (*p.* 637, *vol.* 3, 5th ed.) which makes all judgments rendered in any court of record binding, and a charge upon the lands, tenements, real estate and chattels real, against every person against whom such judgment shall be rendered, which such person shall have at the time of docketing such judgment, or which such person shall acquire at any time thereafter, and be subject to be sold on execution." It can hardly be denied that if the premises in question were the lands, tenements or real estate of John Lamb, in his own right, at the time of dock-

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eting this judgment, the plaintiff has shown legal title, and would be entitled to recover. We have come to the conclusion, as above expressed, that John Lamb had no such interest in the lands in question as to make them subject to a lien by the docket of a judgment against John Lamb. It is true that there is a little confusion created by some modern decisions found in the books, which it seems were at first based upon dicta found in a few equity cases. These were finally collected, and culminated in a direct holding to that effect in a case at law, in *Moyer v. Hinman*, (17 Barb. 139,) to wit, that a judgment regularly docketed against the vendor of lands by an executory contract, is a charge upon the land, and binds the legal title. The following cases are therein cited, as authority for such holding; and are repeated in this case to sustain that doctrine, viz: *Keirsted v. Avery*, (4 Paige, 15.) *Ten Eick v. Simpson*, (1 Sand. Ch. 244.) *Opinion of Chan. in Parks v. Jackson*, (11 Wend. 442,) and *Gouverneur v. Lynch*, (2 Paige, 300.) Although *Moyer and Hinman* differs from the case before us in this, that John Lamb was not, as in that case, the vendor of the property, but only the devisee or legatee of the contract, it is due to the case and to the point we are now considering, and to the authorities cited, that this doctrine be now settled. If this holding in *Moyer and Hinman* is found to be sound, it should be followed; if unsound, its circulation should be checked, or at least limited to its legitimate bounds. Let us review those cases from which this doctrine is taken. *Keirsted v. Avery* was not a case of an executory contract, but was an equity suit, brought to set aside a sheriff's sale of the real estate of a defendant in a judgment, upon the ground that such defendant was only a trustee for another, in holding the title to the estate sold, though the principle settled was not unlike this case. All that was decided by the chancellor in that case was that the court would protect the equitable rights of the *cestuis que trust*, and enable the judgment creditor to reach such actual interest by his bill

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in equity, as the judgment debtor might have in the land so held in trust, after the equitable interests were satisfied. What the chancellor said in that case is exactly in harmony and not in conflict with our views of equity, and of the remedy of the parties in this case. He said, "although the legal title (in that case) may have been vested in Gt. Maxwell (the judgment debtor) by the sale under the "execution, yet it is satisfactorily established that he took it merely as security for his advances, and that he held it in trust," &c.; and the chancellor held that the judgment creditor and purchaser at such sale held it subject to that trust. *Ten Eyck v. Simpson* was also an equity action to compel the grantee of lands to perform specifically an executory contract made by his grantor. The grantee of the vendor had a deed which was junior in date to the date of the complainant's executory contract for a part of the same lands. The complainant (vendee) being in possession at the date of the defendant's deed. The defendant claimed title by virtue of his conveyance; the complainant having no conveyance. The vice chancellor held the possession of the complainant to be notice to the defendant of his right, and that the defendant was to be deemed to have taken the title, to the extent of the complainant's claim as his trustee; and he decreed specific performance. In the vice chancellor's argument in that case he did say, hypothetically, and entirely *obiter*, "If a judgment had been docketed against William (the vendor in the complainant's contract and the grantor in the defendant's deed,) the day after the contract was signed, it would have become a lien to the extent of the unpaid purchase money. Payment to William (the vendor) when the money became due, would not in such case have availed the purchaser." This very careless and unsound dictum of a learned equity judge led to, and perhaps was the principal basis for, the decision of *Moyer v. Hinman*, (17 Barb. 139,) which has been in this particular directly overruled in the same case by the court of appeals, (3 Kern. 180,) so the authority of this case is

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the other way. The next case cited to establish this doctrine is *Parks v. Jackson*. That was an action of ejectment at law, and is in point, because an executory contract was the subject. A remark by the chancellor alone as one of the court of errors, is cited also in support. That remark is as follows: "As the *legal* title alone is in question in the present suit, it is not necessary here to express any definite opinion as to the *legal* lien of a judgment recovered against the vendor in a prior contract of sale upon the unpaid purchase money." Then, after reviewing certain cases in Pennsylvania, Maryland and Kentucky, he adds: "But if a judgment is to be considered in this state a *legal*, as well as an equitable *lien*, as I think it is, I see no difficulty in protecting the equitable rights of the vendee not only against the judgment creditor, but also against the vendor." It is seen that the chancellor spoke hesitatingly on the point. He cited no authority; up to that time none existed in our courts, except that the supreme court in *that* case, had held that payments made by the vendee, to the vendor after filing a *lis pendens*, (which was regarded as equivalent to the docketing of a judgment,) could not be allowed to the vendee; the chancellor holding the lien of a judgment to be the same in effect, upon the legal title, as a *lis pendens*, was for affirming the judgment on that ground. Every other member of the court (twenty in number) were for *reversing*; and it was reversed accordingly. The following syllabus of the case, it appears to me is conclusive, (but not to sustain the chancellor's opinion on the proposition for which it is cited,) viz: "A purchaser under contract who enters into actual possession in pursuance of the terms of his agreement, makes improvements &c., should be made a party to the bill in equity filed to avoid the title of his vendor, so that the court may make such order in the premises as will be just and equitable in reference to the rights of all concerned. If he is not made such party, and a decree is obtained avoiding the title of his vendor and such creditor becomes a purchaser of the *legal*

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estate of his debtor at sheriff's sale under execution on the judgment in his favor, and brings ejectment for the recovery of the land, he is not entitled to recover." The last case which is cited to sustain *Moyer v. Hinman*, in the supreme court, was *Gouverneur v. Lynch*. In looking at this case it will be seen that no question as to the legal effect of a judgment is in the case. It only holds that a subsequent purchaser or mortgagee takes the equitable lien of his grantor. It will be seen in this review, that no well considered case is presented resting upon authority, that sustains the plaintiff's action at law. That his remedy was in equity and *only* there, can I think be maintained by abundant authority. As this is an action at law, only, it might seem to be traveling out of the case to examine what the rights of the parties in equity are; but to maintain the proposition that the plaintiff's relief was in equity *only*, is but another method of showing he has no remedy at law, and has consequently mistaken his form of action; hence a short review may be appropriate. In this review I propose not only to show that the plaintiff's remedy is only in equity, but also that the defendant has such title as will defend him in possession at law, *until equity is tendered to him, by persons coming to claim under titles junior to his*, and that the defendant has not the burthen cast upon him to resort to the court, for the relief which his written contract and possession under it affords him. In *Parks v. Jackson*, (11 *Wend.* 456,) Chancellor Walworth, after remarking that the equitable rights of parties could not be examined in an ejectment suit; having previously stated that the vendee had such equitable rights; said, "the remedy was in chancery, where *alone*, the equitable rights could be protected." Senator Seward, in the same case, who delivered the opinion of the whole court except the chancellor, said, page 460, "So no person can be evicted from the possession of lands by the judgment or decree of *any* court, in a cause wherein he was not made a party; *if in possession at the time of the commencement of the suit*. And why? Because he has an interest,

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and shall have a day in court to assert it." If this is sound doctrine, and it is the law of the highest court, then, whether the defendant's rights are legal or equitable, he has a good defense to this action. In *Moyer v. Hinman*, (3 Kern. 184,) Judge Denio shows the condition of such parties in equity to be this. I do not cite verbatim, because the parties there were reversed. "The defendant was the equitable owner in possession, and the plaintiff had notice of his situation, and of his rights;" and on page 186, speaking of the purchaser's claim at sheriff's sale, he says, "*it was still a lien.*" If this be true, that it was a lien, and not the legal title, no doctrine is better settled than that a person having an equitable lien, or a mortgagee in possession, cannot be evicted by an action at law. (*St. John v. Bumpstead*, 17 Barb. 100. *Phyfe v. Riley*, 15 Wend. 253.) Chief Justice Savage, in the last cited case, makes some sound and sensible remarks as to the person upon whom the *burthen* of litigation and action in such case is thrown. Speaking of a mortgagee in possession, he says, "What reason can be given why he should be turned out of possession? Is it that *he* may be put to the trouble and expense of foreclosing his mortgage, and then bringing ejectment? Such surely cannot be the policy of the law; on the contrary, litigation and expense to parties will be saved by permitting the mortgagee to retain possession until the mortgagor, or those claiming under him, shall institute proceedings in equity for the purpose of redemption." Surely the party who by his sale obtains only a *lien*, and that lien junior to that of the equitable owner, should not be permitted to bring an action at law to enforce such equitable lien, and allowed to override and destroy a prior and better title. I see neither law or equity in this. I have thus attempted to show that the plaintiff's claim is an equitable, and not a legal one, and that the action of ejectment is not the proper remedy.

The court of appeals, in *Heywood v. The City of Buffalo*, (14 N. Y. Rep. 540,) say: "It is still the law that a party

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who brings an equitable action must maintain it upon some equitable ground, and if his cause of action is of a *legal* and not an equitable nature, he must bring a *legal* and not an equitable action, or pursue a legal remedy. If his action is an equitable one, he must state clearly the facts sufficient to entitle him to equitable relief." The case of *Ells v. Tousley*, (1 *Paige*, 280,) also is this case in its equitable features, with the parties reversed. It is as if Gage, the defendant, had filed a bill to restrain the plaintiff from attempting to enforce his title at law, by the taking of a sheriff's deed; and the court restrained him. The allegation was, "that the defendant purchased in the property at sheriff's sale with full knowledge of the complainant's rights; and threatens, after the time of redemption expires, to take a sheriff's deed in pursuance of the sale." The chancellor said, "I have lately had occasion to decide that the lien of a judgment does not in equity attach upon the mere legal title to land in the defendant, when the equitable title is in a third person." In *Sanders v. Aldrich*, (25 *Barb.* 70,) Johnson, J. says, "I do not admit that an action can be *both* legal and equitable in its character; or either, as the evidence on the trial may turn out to be. Neither the rules of law nor of equity admit of metamorphoses." It finds no countenance in the code. That was a case in its features like the present, growing out of an executory contract, where the trust had been severed, by assignment, from the contract and promise to pay. Speaking of the person who held the legal title, he said: "He holds the legal title in *trust*, until his vendee shall become entitled to it by the performance of the contract." In *Ten Eick v. Simpson*, Vice Chancellor Sandford, speaking of the vendee, said: "He had an equitable claim for a deed on paying the stipulated price to William (the vendor) and his assigns. John had become his (William's) 'assigns,' and when the time arrived for the vendee to pay the price of his purchase, he was bound to pay it to John, by the letter of his contract." We need not further pursue the cases in equity, though they

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can be multiplied. We have pursued the cases at law without finding one to support it that has not been overruled. I have no hesitation in holding that the remedy is, and in all similar cases should be, in equity. Though the vendee may if he please bring his action in equity, to quiet his title, he is not bound to do so, and may remain until equity is tendered to him. It would be a strange doctrine of equity indeed, that would throw the burthen of litigation upon a bona fide vendee under such circumstances; or that would fail to protect him when his rights are assailed. What was his position? He was the purchaser from the owner in fee, of a lot of land. He had paid one half of the purchase money, and was permitted by waiver of time of performance, to remain undisturbed. He had entered into the possession—had made large improvements upon the soil, by the fences, by the erection of buildings—and had largely increased the value of the estate. This increased value of the land by the labor of the defendant was equitably his own property. It was acquired by him in quiet, by the vendor's consent, and while laboring under the honest belief, as in equity he might, that such improvements were for his own benefit. Upon the faithful performance of his contract when called upon, he was entitled to these benefits, and to a deed of the title. In making his contract, he took only the hazard of the vendor's title, and of his responsibility that he was able to perform on his part by giving a deed. It was no part of his contract that he should file bills in equity against *junior* claimants. The contract being assignable, he was bound in law to meet the payments, to the legal owner and holder thereof, by assignment or devise, whosoever that might be, until restrained by judicial action. He ran the hazard of *prior* judgments against his vendor, and was bound to search the records for all incumbrances *prior* to the date of his contract, but he was not bound to search for liens intervening between his purchase and the date of his deed. Subject to these hazards, his possession was notice to all the world of his interest. All sub-

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sequent claims acquired by any one against his vendor, or his assigns, are subject to these his prior equities and rights. For what reason, then, should equity impose upon him the burthen of a litigation against *junior* claimants, to secure him in that which in law is already thus protected? How is the case with the other party, the judgment creditor, and his grantees? They are desirous of reaching money, property or rights in action of the judgment debtor; they must therefore become actors. If they found real property, their way was easy and clear; the lien of the judgment secures it. If personal, how is it then to be reached? Not by the docketing of a judgment; it is clear that does not reach personal estate. But it is claimed that the plaintiff, or his grantor, gave the defendant notice not to pay the unpaid balance on his contract to the person holding and owning it, and that the defendant was ignorant enough about his rights, to negotiate with them in relation to it. But how did that relieve the defendant from his liability on his contract, then legally held and owned by Boardman? Suppose he had paid the plaintiff what he demanded; how would that have relieved him from still paying Boardman? It is certainly a new doctrine of equity to insist that a notice upon the obligor is to operate with the effect of an injunction, or will prevent the obligee, or his legal assignee, from enforcing their obligations. Such notice certainly does not create a lien upon the money due. It is also claimed that John Lamb assigned this contract with knowledge of the docketing of the judgment; and that each subsequent assignee had like knowledge, and that they are not therefore purchasers in good faith. There was no such issue presented on the pleadings, or by the evidence. No such fact is found in the case, by the judge, nor is this an equity action, where that issue can be tried. The assignees are not parties. On trial, their rights cannot be passed upon. But suppose it to be true, how would that affect the defendant? He did not know of the judgment, till after the property was advertised; and if he did, how would that relieve him from paying

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his obligation to the owner of it? Such a notice set up, if he had been sued upon his obligation, would constitute no defense to him. The judgment creditor, who must be the moving party, comes more like an adventurer, or an intruder into this litigation, than the defendant. He, the creditor, had, it is doubtless true, a legal demand; he was attempting to enforce it fairly and legitimately in the courts; but with notice that the defendant had a higher and a prior lien. His diligence was proper and commendable, but he was bound to know the law; he had no equities against the defendant, and could impose no burthens on him; more diligence in another way would doubtless have accomplished his purpose. A creditor's bill, with an injunction restraining the executor of Anthony Lamb, and John Lamb the legatee, from paying over or assigning this legacy, or if he had already assigned, by making the assignees parties, and charging them with bad faith, would doubtless have secured to him this balance. It is not, however, our duty to search for, or point out to him, his remedies, any further than to show that in this case he had no remedy at law; though doubtless a perfect remedy in equity, and there *only*.

It is also argued, in order to show that this devise was *real* estate, that so much is the title of lands in the vendor in an executory contract, that he can bring ejectment to recover the possession, in default of the payments by the vendee. It is not necessary to deny this proposition, so far as it is used to work out a result. His right to bring his action, however, is not because he has the absolute legal title, and the vendee *none*, but because he has a lien, which, through the instrumentality of an action, he can make into a perfect title; that is, the vendee's title, as between the parties to the contract, is so far conditional that it is forfeited by default in payment. The action only lies when default in payment or condition is made, to obtain a judicial forfeiture of the vendee's title. But had the vendor severed his right to the money due, from his trust to convey, by a sale of the contract and the moneys due

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thereon, his action of ejectment would not lie. So the right to bring the action depends not upon the vendor's title to it as real estate, but upon the default of the vendee in the payment of *money*, by which he forfeits title. So too, it is urged, that by the terms of the written contract the relation of landlord and tenant existed between the vendor and vendee, and that John Lamb by the will, succeeded to the estate of landlord of the premises. If such an anomalous or hermaphroditical instrument, or rather two different instruments in one, can exist in law as a contract to convey and a lease creating a tenancy, its character was changed by the assignment of the contract by John Lamb, who thereby severed the power in trust to convey from the contract of promise to pay the purchase money. The assignee of the promise had no title therewith to make him a landlord; and the holder of the naked trust, only, could have no rent due to him. This point, I think, is not sound. The judgment should be affirmed.

ROSEKRANS, J. concurred.

BOOKER, J. The law of this case has been already pronounced by this court on a former appeal, and by that decision we must abide, whatever may be our individual opinions. I entered my dissent at the time the decision was made. The decision was against my convictions, nor has a reconsideration of the case changed my views. Still I am as much concluded by that judgment as though I had yielded to it my assent. As I had occasion to remark in another case, similarly situated, "the former adjudication was a solemn annunciation of the law on the facts, and it must control until reversed by the court of appeals. The decision was made between the same parties, in the same action, on the same facts, after full argument and upon mature deliberation. It would therefore be anarchical to disregard or disturb it. Nor can it make any difference that the court is now differently constituted, as regards the persons who compose

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it, from what it was when the decision was made. The law of the case is the same, and must be adhered to as already pronounced until reversed by the appellate court."

In obedience to the law as declared by the former decision, I directed the judgment from which this appeal is taken, and in further obedience thereto I must vote for an affirmance; at the same time I must be permitted to express my individual opinion against the correctness of the decision.

I shall not here elaborate my views, or attempt an argument. I will only very briefly state my convictions.

It was insisted on the former appeal that the McCoy judgment was without jurisdiction and void, and this objection is here again suggested. But the case shows that the summons in that action was personally served on the defendant, John Lamb, in the city of New York; that the action was on four promissory notes; and that the judgment was entered and docketed in due form. It appears, therefore, that the superior court had jurisdiction of the person and of the subject matter of the action, and the judgment was valid and binding. (*Code*, § 33, *sub. 2.*)

It was also urged, and still is, that the misrecital in the sheriff's deed of the name of Daniel instead of William McCoy, as plaintiff in the action against John Lamb, renders the plaintiff's chain of title incomplete. But such misrecital must be held quite immaterial. There was sufficient in the deed to identify the judgment and execution under which the sale was made, after rejecting the particular in which the recital was erroneous. The following cases are decisive of this objection. (5 *Cowen*, 529. 7 *id.* 13. 9 *id.* 182. 10 *John*. 382. 4 *Wend.* 585. 11 *id.* 422, 427. 18 *Barb.* 193, 201.)

The important question in the case, indeed the only one discussed on the argument of the appeal, is whether the McCoy judgment attached as a lien on the premises in controversy. The premises were originally owned by Anthony Lamb, who contracted to sell and convey them to the de-

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feudant, Samuel Gage, reserving in terms his position as landlord and owner of the fee. Gage entered and remained in possession as vendee under the contract to purchase until Lamb's decease. At this time, and also at the time of the sale under the judgment and execution against John Lamb, there remained unpaid on the contract, a sum which on the 12th of July, 1859, amounted to \$436.54. Anthony Lamb, by his will, devised the land and contract to his son John Lamb, with direction to him to carry the contract into effect. Thus John Lamb was made specific devisee, and became the owner of the fee, subject to Gage's rights under the contract of purchase; and the relation between him and Gage was that of vendor and purchaser under such contract. John took the same rights of property by virtue of the will as if his father had conveyed the premises to him by deed. If so, then it follows that the judgment against John Lamb became a lien on the premises, to the extent of the unpaid purchase money, and the purchaser under execution issued on the judgment would acquire John Lamb's interest.

In this way the plaintiff in this suit acquired the position of John Lamb in regard to the premises in controversy, which was in fact precisely the position held by the testator, Anthony Lamb, at the time of his decease. He was entitled to the unpaid purchase money, and on being paid according to the terms of the contract, was bound to execute to Gage, the purchaser, a deed of conveyance. (1 *Sandf.* 244. 11 *Wend.* 442. 17 *Barb.* 137. 3 *Kern.* 180.)

It is unnecessary here to decide any question between heirs and personal representatives, inasmuch as this is not a case of intestacy. Anthony Lamb left a will and testament, by which he devised these premises and the contract to his son John, who of course took as purchaser, the same as if his father had conveyed to him. The devise was a specific devise of both the land and contract; so there was no separation of the two estates or interests. In this regard this case is like *Parks v. Jackson*, (11 *Wend.* 442.) There

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Samuel Franklin died, having devised the land (then in the possession of purchasers under contract of purchase with him) to his sons Abraham and John; and Hendricks the plaintiff, made title under judgments against them, the same as Smith in this case makes title under judgment against John Lamb. If, as is claimed to be the law, the judgments against Abraham and John Franklin did not attach as liens to the lands, because under contracts of sale made with their father, the testator, then Hendricks had no shadow of title whatever. But notwithstanding the case passed through the courts, from the circuit to the court of errors, it was not intimated that his title was not good because thus acquired and deduced. On the contrary it seems to have been taken for granted by the court and counsel that his title was sufficient to put the defendant to a defense on other grounds. The chancellor starts his opinion with the remark, that "if the conveyance to Henry Franklin was fraudulent, the judgments against Abraham Franklin and John Franklin were at the time of the commencement of the chancery suits *legal liens* upon the two thirds of the lots in question *devised to Abraham and John Franklin by the will of their father*; and a conveyance by the sheriff under execution upon those judgments would at that time *unquestionably have vested in the purchaser* at the sheriff's sale such a title as to enable him at law to recover from the persons then in possession, under the contract of purchase." Notwithstanding these remarks occurred in the dissenting opinion, they were accepted as sound in principle, and the examination of the case in the supreme court and in the court of errors proceeded on the hypothesis that a judgment against a devisee of lands held under a contract of purchase made with the testator becomes a lien thereon. It is true equity will limit and control the lien, being a general lien, so as to protect the equitable rights of third persons under the contract who act in good faith. In this case, if Gage had paid the balance remaining unpaid of the purchase price to John Lamb, in good faith and without

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notice of the judgment lien, it would have been deemed a good performance of the contract, and he would be protected in his title notwithstanding the judgment. But instead of paying in good faith and without notice, he was informed of the plaintiff's rights, after which and putting him at defiance, he undertook to settle and arrange with the assignee of John Lamb, which was in law the same, as regards his rights, as if he had undertaken to settle and arrange with John Lamb himself; for an assignee of a chose in action stands in exactly the same situation as the assignor, as to the equities arising upon it. (18 *Law and Eq. Rep.* 82. 24 *How.* 44. 22 *N. Y. Rep.* 535.)

So if he had paid to the executor of Anthony Lamb in good faith, supposing that the money was necessary to meet the expenses of due administration, the executor having made claim to the money for that purpose, he would perhaps have been protected in the payment. And in case the money was not exhausted in the payment of the debts of the testator, or in case it should be afterwards found that there were other funds which should be applied thereto instead, the owner of the legal title might have his claim against the executor therefor. (2 *Comst.* 397.) In this case the money was not paid to or claimed by the executor; nor is it pretended that it should have any other application than in satisfaction of the specific direction given it by the will. The devise must therefore be deemed to have the assent of the executors. So far as we can see from the case before us the executor had no claim upon it, or duty to perform in regard to it, and the right to the unpaid purchase money remained with the person in whom the legal title to the land was vested.

It is said that there was an equitable conversion of the land into money by the contract of sale. This was undoubtedly so, but only for the purpose of securing to the parties their equitable and just rights. This is the foundation of the doctrine of equitable conversion, which can only be invoked for the purpose of preserving an equity. There being

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no equity to prevent that result, a judgment against a vendee of lands who has contracted to convey becomes a lien thereon to the extent of the unpaid purchase money. It is so decided in numerous cases. And there being no equity to prevent it, a judgment against a devisee of lands, under a contract of sale made with the testator, becomes a lien also, to the same extent. So again, *if there be no equity to prevent it*, a judgment against the heir at law of an intestate who has contracted to sell the lands will become a lien thereon. I say this with all due deference to the decision in *Adams v. Green*, (34 Barb. 176.) Suppose the case of a single devisee or single heir, and also suppose there are no debts of the executor, or sufficient personal property to satisfy them; would not a judgment against the heir or devisee attach, the same as it would if recovered against the testator or intestate after he had agreed to convey? In case of a devisee of lands which Lamb here contracted to be sold by the testator but not conveyed, equity will not permit the lien to the prejudice of the rights of the executor; nor, in case of intestacy, will equity allow the lien of the judgment against the heir without recognizing and protecting the right of all parties interested in the subject matter and avails of the contract.

It is said that the interest of the vendor, after the contract of sale, is personal property. But a judgment, as we have seen, will attach to the lands agreed to be conveyed, in case the whole purchase money is not paid. So it is said that on the decease of the vendee, the money remaining due and unpaid on the contract will go to his personal representatives. Undoubtedly in case the contract be afterward performed, except in case of a specific devise. But what will be the condition of the property in case of a forfeiture of the contract? Will it not then go to the devisee or descend to the heir at law?

It seems very clear to me that Hinsdale, by the sheriff's deed, obtained the legal title to the lands subject to the contract with Gage, and the plaintiff acquired his position and

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right by virtue of the conveyance from Hinsdale. The plaintiff's title related back and took effect from the date of the lien of the judgment, and overreached the supposed rights of those claiming from or under John Lamb, by sale and conveyance subsequent to the lien. So the plaintiff having acquired the position and rights of Anthony Lamb at the time of his decease, the relation between him and Samuel Gage was that of vendor and purchaser. The plaintiff had a right to the premises unless Gage should perform the contract of purchase, and Gage could tender performance to the plaintiff. The legal relation between the plaintiff and Gage being that of vendor and purchaser, Gage was not entitled to notice to quit before suit. (3 Barb. 576. 5 Wend. 26. 21 id. 230. 22 id. 605. 7 Cowen, 747.)

But the decision of the case is a foregone conclusion, to which I must yield obedience.

'The judgment must be affirmed.

JAMES, J. This case comes before us for the second time. On the first trial the plaintiff had a judgment, and on appeal, before Justices ROSEKRANS, POTTER and BOCKES, the latter dissenting, the judgment was reversed and a new trial ordered. On the second trial the plaintiff proved, in addition to what was shown on the former trial, that the defendant had knowledge of the plaintiff's title before service, during their contract and taking a deed from John Lamb, and giving a bond and mortgage back for the balance of the purchase money. I regard that as an important fact, and so far distinguishing the case from what it was when formerly before the court, as to exempt it from the rule of *res judicata*. I think it may be re-examined.

The principal question in this case is the one first determined by the court below. It is whether or not the judgment in favor of McCoy against John Lamb, under and through which the plaintiff claims title, ever became a lien upon the premises herein sought to be recovered. If it did,

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then the judgment below must be reversed ; otherwise it must be affirmed.

It may not be inappropriate to first consider what would be the rights of the plaintiff had this judgment been against Anthony Lamb, docketed after the contract, and a sale and purchase before his death.

An agreement for the sale of land is a personal contract ; it does not attach to the land sold, nor divest the vendor of his estate. The legal title still remains in him, and he could convey to a *bona fide* purchaser without notice and for value, a title to the premises, freed from the equity of the vendee. A judgment against the vendor would be a lien upon the land, to the extent of his interest. (2 R. S. 256, § 3. *Parks v. Jackson*, 11 Wend. 447.) A judgment against the vendee would not be a lien upon such land, (1 R. S. 744, § 4,) because under such contract no legal estate vested in the vendee upon which the judgment could attach, or which could in any way be reached by process of law. (*Story's Eq.* § 790. *Bogart v. Perry*, 1 John. Ch. 52. 17 John. 351.)

A judgment from the date of its docketing becomes a charge upon all the real estate whereof the judgment debtor at the time had the legal title in his own right, and the judgment creditor has at law the right to acquire that title by sale and purchase, under execution. (*Moyer v. Hinman*, 13 N. Y. Rep. 184.) After such sale, and the expiration of the period of redemption, if no redemption take place, the purchaser becomes possessed of the title and all the interest held by the judgment debtor at the time of docketing the judgment, subject to the same equities that then existed against him, or which may have arisen since, through want of knowledge of such judgments. (*Keirsted v. Avery*, 4 Paige, 15. *Ten Eick v. Simpson*, 1 Sand. Ch. 244. *Parks v. Jackson*, 11 Wend. 442. *Gouverneur v. Lynch*, 2 Paige, 300.) The vendee of a previous contract of sale of such premises from the judgment debtor, upon performance of the contract may compel a conveyance from the purchaser.

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Such being the law, it is certain that had the judgment, under and through which the plaintiff claims title to the premises in controversy, been against Anthony Lamb, obtained after the contract to Gage, the plaintiff would have the legal title to said premises and a legal estate therein equal to the unpaid purchase money due on the contract; and that Gage's refusal to pay that balance as shown upon the trial, would have entitled the plaintiff to a judgment for the possession of the land. (*Parks v. Jackson*, 11 *Wend.* 449.)

Upon the death of Anthony Lamb, the legal title to the estate, and his interest in the contract, passed to John Lamb, by the devise in the will of Anthony Lamb. This devise was not in trust, nor did it create, or intend to create a trust. It gave the title and all the estate and interest of the testator in and to the land, and the benefits arising from the contract of sale to the devisee, imposing only an obligation to convey in case the contract was performed by the vendee. John Lamb's estate was such that he could have conveyed to a third person, not having actual or constructive notice of the contract, a good title to the lot.

Can there be a doubt that John Lamb would have had an estate in fee to this land, had Gage become insolvent or refused to perform, and the contract become forfeit? Such acts would surely free it from the equity arising under the contract and leave the legal title in him, discharged of all such equities, to the vendee. (*Sanders v. Aldrich*, 25 *Barb.* 71, 72, *affirmed in the court of appeals*, December, 1861.) Surely then, a judgment docketed against John Lamb, while he held the legal title and the vendor's interest in the contract of sale, would become a charge on premises so held by such title, even though subject to the equity of the vendee.

It is insisted by the defendants that John Lamb, by the will of his father, merely became the trustee of the defendant's title to the land. It seems to me that the will itself gives no warrant for any such construction; on the contrary its language leads to an entirely different conclusion.

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This view is sought to be sustained by the application of the doctrine of equitable conversion. It is claimed that under this doctrine the vendor in a contract for the sale of land, if the vendee enter into possession and make improvements, becomes a trustee for the vendee as to the land, and the vendee a trustee for the vendor as to the purchase money, and until payment the vendor has but a mere lien on the land as a security for the purchase money. This rule is often thus broadly stated in the books, yet I doubt if any case can be found fully sustaining it as thus stated. The rule as it in fact exists is based on the equitable fiction of treating the contract as if specifically executed, and the vendee the equitable owner of the land and the vendor the equitable owner of the purchase money, thereby creating an implied trust in the vendor as standing seised for the vendee's benefit. It is very doubtful if this doctrine of equitable conversion has any application whatever to a contract for the sale of land until full payment is made of the purchase money. (*Bogert v. Perry*, 17 John, 354, 355.) But if it has it cannot be extended and applied beyond the amount of purchase money actually paid. (*Griffith v. Beecher*, 10 Barb. 434, and authorities there cited. See *Hand's opinion*, *Moyer v. Hinman*, 3 Kern. 189.) Although such a construction may be a novelty in law, and without any reason to support it, I think it certain that beyond the interest created by actual payment, the vendor has the legal as well as equitable title to the land, of which no fiction of equity can or will deprive him. Again, in cases subject to its application, this fiction is only invoked to do equity and promote justice, never to overcome a prior legal right, of equal equity, as is sought for it in this case.

The equitable rule of descents, based also on the doctrine of equitable conversion, is invoked to show that the intent of the testator by his will was simply to make the devisee therein the trustee of the title. That rule is this: where a contract for the sale of land is entered into and the vendee pays part down and enters into possession, and either dies

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without will, the vendee's interest in the contract passes to his heir as land, and that of the vendor to his personal representatives. So far as this rule touches the several *interests* of the respective parties it is perfectly just and in accordance with well established principles; that is, when the balance of the purchase money is paid, the land descends to the heirs of the vendee and the money passes to the personal representatives of the vendor. But until paid, no change of title takes place; the heir of the vendee cannot obtain the title, nor the personal representatives the money or the land. Suppose on the death of the vendor the vendee should prove insolvent and the contract remain unpaid whereby it becomes forfeit, would the vendor's personal representatives be entitled to a conveyance from his heir? I think not. He could not be called upon to convey until the purchase money was paid, (*Moon v. Burrows*, 34 Barb. 175;) and holding the legal title subject only to the vendee's equity under the contract, by its forfeiture the land becomes freed from that equity, and he possessed of the whole estate. The personal representatives being entitled to the unpaid purchase money only, have no equitable claim to the whole estate as against him. (*Sanders v. Aldrich*, 25 Barb. 71, 72. See *Story's Eq.* §§ 12, 14.)

I cannot perceive that the doctrine invoked aids at all in ascertaining the intent of the testator, unless it be that being aware of the equity rule, if he died intestate, he sought by his will to prevent its application to his estate, by placing the legal title and beneficial interests in the hands of his son, so that upon his death his son would stand precisely in his shoes, both as to the land and the contract.

In the hands of the vendor the contract was a chattel capable of sale and assignment, separate from the land. In such case the assignee would be entitled to receive and enforce the payments on the contract, but would have no interest in or lien upon the land. If before the assignment a judgment had been obtained against the vendor, it would have been a lien upon the land to the extent of the unpaid

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balance on the contract. A sale and conveyance under such judgment, and notice to the vendee, would entitle the purchaser under the judgment to the payment of the unpaid purchase money from such vendee, notwithstanding the assignment by the vendor of the contract to a third person. Equity would prevent such assignee from enforcing payment of such contract against the vendee, because the assignee took the contract subject to all the equities existing against his assignor, even though he had no knowledge of such equities. (*Mangles v. Dixon*, 18 *Eng. L. and Eq. Rep.* 82, and *cases cited*.) As I have before attempted to show, John Lamb, as the owner of the beneficial interest in the contract, and the holder of the legal title, stood precisely in the place of his ancestor. This being so, the judgment under and through which the plaintiff claims title to the estate became a lien on the land, for the unpaid balance of the purchase money, immediately on the docketing of the judgment in the county where the land was situate, after the death of the testator. In this case that was while John held the contract.

The lien of the judgment against John Lamb having attached to the land, before the assignment by Lamb of his interest in the contract, the assignees thereof took it subject to such lien. Upon the sale and conveyance of such land, by the sheriff, under and by virtue of the execution issued upon the McCoy judgments, the plaintiff, as the grantee of the purchaser thereof, upon notice to Gage, was entitled to the balance unpaid of the purchase money on the contract of sale, or in default thereof, the possession of the premises. Payment of the contract by Gage to the assignees, after notice of the title derived from the sheriff's sale, was in his own wrong and did not entitle him to a conveyance from the purchaser under the sheriff's sale. After such sale John Lamb had no title or interest in the land, and hence could give none by his deed.

The legal title to the premises in controversy was, at the time this action was commenced, in the plaintiff; the con-

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tract had become forfeit, and hence the plaintiff was entitled to recover the possession of the land described in the complaint.

In my opinion the judgment below should be reversed and a new trial granted ; with costs to abide the event.

Judgment affirmed.

[WARREN GENERAL TERM, July 14, 1868. *Rosekrans, Potter and Becker*, Justices.]

WALLACE vs. BASSETT and others.

The power conferred upon married women to *devise* real and personal estate, by the act of April 11, 1849, amending the act of April 7, 1848, for the more effectual protection of the property of married women, was not repealed by the act of March 20, 1860, concerning the rights and liabilities of husband and wife.

Deeds of present separation, between husband and wife, are valid so far as relates to the trusts and covenants by which the husband makes provision for the wife, and the indemnity given to the husband by the trustees. Such covenants are mutual and dependent.

By articles of separation, between husband and wife, the former covenanted that the latter might enjoy all her estate, goods, &c. that belonged to her when she was married; and that he would not claim or demand any property which she should thereafter own, or which should be devised or given to her, or which she might otherwise acquire; and he conveyed to the trustees certain real and personal property and agreed to convey other real estate, in trust for the wife's support. The trustees agreed to take the estate so conveyed and to be conveyed, in full satisfaction for the support and maintenance of the wife; and the property was to be disposed of as the wife and the trustees might deem proper. The trustees also agreed to indemnify the husband against the wife's debts or the expenses of her support &c. The husband afterwards conveyed to the trustees the real estate agreed to be conveyed. *Held* that the husband was *stopped* by the covenants in the deed of separation, from claiming, after the death of the wife, a life estate in the land so conveyed by him to her, under the tenth section of the act of March 20, 1860, as her survivor.

THIS was an action of ejectment, tried at the Washington circuit in May, 1863. The plaintiff claimed a life estate in one-third of the premises under the provisions chapter 90,

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Sess. Laws of 1860, as the survivor of his wife, Jane Wallace, who died 17th November, 1860, seised of the real estate described in the complaint, in fee, in her own name. The action was tried without a jury. The facts sufficiently appear in the opinion.

James J. Lourie, for the plaintiff.

L. A. Boies, for the defendants.

POTTER, J. The plaintiff's claim to recover in this action is based on the tenth section of the act of the legislature, chapter 90, passed March 20, 1860, which is in the following words: "§ 10. At the decease of husband or wife, leaving no minor child or children, the survivor shall hold, possess and enjoy a life estate in one-third of all the real estate of which the husband or wife died seised." Technically, the plaintiff has brought himself within the provisions of this section. He survived his wife; she died in November of the year 1860, leaving no minor child or children. She, at the time of her death, owned the estate in question in her own name in fee; having purchased it in 1858. The defendants were in possession at the commencement of the action; possession had been previously demanded by the plaintiff, and refused by them. This is the plaintiff's case. The defendants make claim to the estate by devise from Jane Wallace, the wife of the plaintiff, to Catherine Ann Bassett, one of the defendants, now an infant, under whom, through her guardian, the defendants are in possession. The will of Jane Wallace had been duly proved as a will of both real and personal estate before the surrogate of Washington county, and in terms it gave and devised all the testatrix's real and personal estate to the defendant Catherine Ann Bassett. The defendants also set up, by way of estoppel to the plaintiff's right of recovery, articles of separation between the plaintiff of the first part, Jane Wallace, his wife, (the testa-

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trix) of the second part; and George Fisher and Lyman H Tucker, trustees therein mentioned, of the third part, dated 8th January, 1848. By these articles the plaintiff and his wife covenanted and agreed to live separate and apart, during their lives. The testatrix to live where and with whom she pleased, without disturbance from him, the plaintiff; that she might enjoy all her estate, goods, furniture, jewels, &c. she brought to him when she became his wife; and the plaintiff therein further covenanted "that he would not claim or demand any property, *which she shall or may hereafter own*, or which shall be devised or given to her; or *that she may otherwise acquire.*" The plaintiff also covenanted therein with the said trustees, parties of the third part, and conveyed to them certain real and personal property which came to him by his said wife, and agreed that he would thereafter convey to them a certain lot of real estate, in trust, for the maintenance and support of his said wife. By the evidence in the case it appeared that this last mentioned real estate had been purchased with the moneys of the testatrix; except about \$130. The said trustees, of the third part, agreed to take the estate so conveyed, and to be conveyed, "*in full satisfaction for the support and maintenance, and all alimony whatever of the said Jane Wallace,*" and the property was to be disposed of as the testatrix and the trustees might deem proper; and in consideration of one dollar received from the plaintiff, the said trustees, of the third part, covenanted and agreed with the plaintiff to indemnify and save him harmless from all debts contracted, or thereafter to be contracted, by the said Jane, or on her account, and to repay to the plaintiff all debts that he might be compelled to pay on her account, and to indemnify the plaintiff against the expenses of the support and maintenance of the said Jane, his wife, wherever she might be, or whether she might be a town or county charge, to all which the parties respectively bound themselves, their heirs, executors and administrators. The plaintiff subsequently conveyed to the trustees,

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as such, the lot of land in the agreement mentioned, and the separation immediately took place, and continued during the life of the testatrix. Fisher, one of the trustees, died in 1854. Tucker still survives. Neither they nor the survivor have any claim against the premises, and neither of the trustees ever gave any consent in writing to the testatrix's making a will. These facts constitute the defense.

1. The first question of law that arises in the case is as to the power of the testatrix to make a will. This power did not exist at common law, without the consent of the husband. It was however conferred by statute, by the act for the more effectual protection of the property of married women, passed April 7, 1848, amended 11th April, 1849, (*ch. 375, § 3, as amended,*) which provided "that any married female may take by inheritance or by gift, grant, devise or bequest, from any other person than her husband, and hold to her sole and separate use, and convey and *devise* real and personal property, and any interest or estate therein &c., "*and with like effect as if she were unmarried,*" &c. The act of 1848 authorized married women to *receive* and *hold* property; but omitted the power to make contracts, and the power to *devise*, which power was added by the act of 1849. These powers remained and were in full force when the act of 1860, chapter 90, (*Laws of 1860, p. 157,*) was passed. This latter act, nowhere in *terms*, repeals the right or the power of married women to *devise* their estates; though the third section of the last named act modifies her power to *convey* and to make *contracts*, in reference to her separate estate, without the assent in writing of her husband, except in certain cases. If the power to *devise* so conferred has been repealed, it must be by implication arising from the language of the 96th section of this last named act, which is "that at the decease of husband or wife, &c. the survivor shall enjoy a life estate in one-third of all the real estate of which the husband or wife shall die seised." Repeal by implication is not a doctrine favored by the courts. *Dwarris*, in his

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work on the *construction of statutes*, 532, lays down the rule "that a general statute, without negative words, will not repeal the particular provisions of a former one, unless the two acts are irreconcilably inconsistent." (*Foster's case*, 11 Co. R. 63.) In *Bowen v. Lease*, (5 Hill, 225,) Nelson, Ch. J. said: "The invariable rule of construction in respect to the repealing of statutes by implication is that the earliest act remains in force, unless the two are manifestly inconsistent with and repugnant to each other; or unless in the latest act some express notice is taken of the former, plainly indicating an intention to abrogate it." As laws are presumed to be passed with deliberation, and with full knowledge of all existing ones on the same subject, it is but reasonable to conclude that the legislature in passing a statute did not intend to interfere with or abrogate any former law relating to the same matter, unless the repugnancy between the law is irreconcilable." Testing the statute of 1860, by this sensible rule, the power to *devise*, conferred by the act of 1849, upon married females, is still in force, or was in force at the time of the death of the testatrix.

The two statutes may exist together; the former being in force in cases where a devise is made, the latter in cases of intestacy.

2. I am also of opinion that the plaintiff is *estopped* from bringing this action by his covenants in the deed of separation. He covenanted with her that he would not claim or demand any property which she should thereafter own, or that she might otherwise *acquire*. The property in question she did *afterwards acquire*, and did *own*, and it is now settled that deeds of *present separation* are valid, so far as relates to the trusts and covenants by which the husband makes provision for the wife, and the indemnity given to the husband by the trustees. (2 *Bright on H. and Wife*, 313. *Rodney v. Chamber*, 2 East, 293.) The covenants were mutual and dependent. The trustees, in her behalf, in consideration of property granted and to be granted for her

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support by the plaintiff, as well as his covenant to claim no property which she might thereafter own or acquire, covenanted on their part to indemnify him against her future support and future alimony. The plaintiff's covenants were for her benefit, as well as for the benefit of her trustees. Her covenants, and the covenants of the trustees, were for the plaintiff's benefit. Upon this consideration the plaintiff enjoyed the benefit during her life of all the covenants made by her and her trustees in his favor. The covenants were mutual, reciprocal and beneficial to all the parties, and were acted upon by all the parties; and the consideration was solemnly acknowledged. He was relieved during her life from her support. It would be grossly inequitable and unjust, as well as immoral, not to hold him estopped by his deliberate and solemn covenants. (*Dennison v. Ely*, 1 Barb. 623.) Estoppels may always be resorted to as a means to prevent injustice, always as a shield. (*Pierrepoint v. Barnard*, 5 Barb. 375.) This is the rule wherever it can be seen that the act, or the covenants, must have had the effect of influencing the conduct of the party setting them up; and especially where the party making the claim has had a consideration, or has induced the other to act upon it. (8 Wend. 480, 483, and cases cited. 13 id. 178. 15 id. 311, 312. *Bell v. Thorn, Hill & Denio*, 433, 434.)

I think the plaintiff's complaint should be dismissed, with costs.

Judgment accordingly.

[WASHINGTON SPECIAL TERM, May 26, 1863. Potter, Justice.]

BARNES vs. BADGER.

The limitation of time, in the statute directing that justices of the peace shall render judgment and enter the same in their dockets within four days after the submission of the cause, was intended for the convenience of the parties and the protection of their rights; and a compliance with the statute may be waived by them.

When any act is deferred beyond the time limited in the justices' act, by the consent of the parties, it is no error that the act is done after the time specified in the act, if done within the agreed time.

Where parties submit their cause to the justice, and stipulate with each other that the justice may take five days instead of four, to render judgment, it *seems* they will be *estopped* from ever alleging in a court of justice, as a ground of error, that the judgment was rendered on the fifth instead of the fourth day.

THIS cause arose in a justice's court. The return of the justice, after stating the proceedings in the cause, and embracing the trial and evidence &c. concludes as follows:

"The cause was then submitted without argument; when by stipulation of parties, at my request, they agreed to five days' time instead of four in which to decide upon the case. Therefore, I, on the 14th day of November, 1854, rendered judgment in favor of the plaintiff against the defendant for

Damages,	\$77 96
Costs,	3 04

\$81 00"

The return showed that the judgment was rendered on the fifth day. The county court reversed the judgment of the justice, and the plaintiff appealed to this court.

By the Court, MASON, J. The only question presented in the case is whether the justice had so far lost jurisdiction of the cause as to make the judgment rendered on the fifth day erroneous. The statute directs that the justice shall render judgment and enter the same in his docket within four days after the cause shall have been submitted to him for his final decision. (2 R. S. 247, § 124.) I am aware that it has been decided under this statute, that it is the duty of the justice

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to render his judgment within the four days after the cause is submitted to him for final decision ; and that a judgment rendered after the four days is erroneous, and will be reversed on error. (*Watson v. Davis*, 19 *Wend.* 371. *Young v. Rummel*, 5 *Hill*, 60.) The statute is equally as imperative in its language that the justice shall enter the judgment in his docket within the four days, as it is that he shall render it within that time ; and yet it was held in *Hall v. Tuttle* (5 *Hill*, 38, 41, 42) that he was not thus limited as to time in entering the judgment in his docket, if he had actually made up his judgment and made an entry thereof in his minutes ; or in other words, that the entry in the docket after the four days was good. I am not going to complain of these cases, although it seems to me that it is hardly consistent to construe one part of this same sentence—coupled together as the two acts are—as imperative and the other as directory. The general rule most certainly is, that where a statute directs a public officer to do a thing within a certain time, without any negative words restraining him from doing it afterwards, the naming of the time will be regarded as merely directory, and not as a limitation upon his authority. (*Pond v. Negus*, 3 *Mass. Rep.* 230. *The People v. Allen*, 6 *Wend.* 486. *Marchant v. Langworthy*, 6 *Hill*, 646. *Ex parte Heath*, 3 *id.* 43. 12 *Wend.* 481. 5 *Conn. Rep.* 269. 11 *Wend.* 604. *The People v. Cook*, 14 *Barb.* 290 to 292.) And this principle seems to have been applied as well to acts judicial in their character as those which are ministerial. The statute under consideration has no negative words limiting the power of the justice to render a judgment after the four days. And I must confess when I read this statute, which says that the justice shall render judgment, and enter the same in his docket within four days after the cause shall have been submitted to him for his final decision, I am at a loss to ascertain how any court can say that the legislature intended that the first should be mandatory and the second directory. The only reason assigned by the court for giving

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a different construction to one from what is given to the other, is that the one act is judicial and the other ministerial; and as there is more propriety and necessity for limiting the judicial act to the four days than there is the ministerial one of entering the judgment on the docket, therefore the former is limited, and the latter not. This would be a very good argument to address to the legislature while framing the statute, but I think a very poor one to arrive at the actual legislative intent of this statute, coupled by the language as are the two acts in the same sentence. I fully agree with the court in *Watson v. Davis*, (19 Wend. 372,) that a limitation of the time during which the cause might be held under advisement is not only proper in itself, but is important in reference to the remedy by certiorari or appeal; for without such a limitation the party would never know when to expect judgment, which certainly would be a serious prejudice to his rights; and I am not disposed particularly to complain of the decisions referred to, because the courts have placed this limitation of time upon these courts instead of the legislature. In the case at bar, however, I am entirely satisfied that the judgment is neither invalid nor erroneous. This limitation of the time was intended for the convenience of the parties and the protection of their rights; and a compliance with this requirement of the statute may be waived by the parties, and when the party knows the judgment may be expected by the fifth instead of the fourth, he is not injured. It is the right of the party to have his judgment rendered within the four days; yet he may waive that right. There are no rights which a party possesses which he may not waive, even his constitutional rights. An unlawful adjournment of a cause is held by the courts to operate as a discontinuance of the cause, and renders the subsequent judgment erroneous; and yet it has been held that if a party appears on the adjourned day, he waives his right to complain of the error, or if he has consented to the adjournment he equally waives his right. Where a venire has been issued in a justice's court and the jury have disagreed, the

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statute is equally imperative that the justice shall issue a new venire returnable within forty-eight hours; and yet it was held no error to adjourn the cause to a future day, and issue a venire returnable on that day. (*Fiero v. Reynolds*, 20 Barb. 275.) The court says this limitation of time was for the convenience and benefit of the parties, and they may waive compliance with it by consenting that it may be made returnable at a future day; and I venture to say that no case can be found in the books where these statutes controlling and governing justices' courts have fixed a limit of time within which an act was to be done, and when it has been done after the time by the consent of the party, that the judgment has been held erroneous. There is nothing in the argument that the justice had not jurisdiction after the four days had elapsed, and therefore the stipulation of the parties could not confer it. I admit that where the subject matter of the action is of a character of which the justice has not jurisdiction, the consent of the parties cannot confer jurisdiction. But here the justice had jurisdiction over the parties and the subject matter, and if he had let the four days go by without the consent of the parties, his jurisdiction to render judgment would have been gone. And as the statute limits this authority to adjourn a cause to ninety days, it is held that if he adjourns the cause beyond ninety days he loses his jurisdiction, and has no right to try the case; and yet if the parties have consented that he might adjourn it beyond the ninety days there is no error. The law requires the cause to be tried upon the pleadings, and yet where the parties agreed to waive their pleadings and try the cause on its broad merits, the courts held them to their agreement, even upon retrial upon appeal in the county court. (9 Cowen, 274.) And so when any act is deferred beyond the time limited in the justices' act, by the consent of the parties, it is no error that the act is done after the time specified in the act, if done within the agreed time. But it is questionable whether this appellant is not estopped from alleging this as error. It was

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adjudged in the case of *Peck v. McAlpine*, (3 *Caines*, 166,) where the justice adjourned a cause beyond the time authorized by the statute, at the instance of a party, that he was afterwards estopped from alleging it as error. Here in the case at bar, where the parties submit the cause to the justice, and stipulate with each other that the justice may take five days instead of four to render judgment, it is questionable whether upon the doctrine of estoppel the appellant's mouth is not closed from ever complaining in a court of justice that his judgment was rendered on the fifth instead of the fourth day. The judgment of the county court should be affirmed.

[TOMPKINS GENERAL TERM, October 27, 1857. *Gray, Baloon and Mason, Justices.*]

 SAGENDORPH vs. SHULT.

A justice of the peace issued a summons, on the 28th of November, 1856, returnable on the 5th of December, then next, at *one o'clock P. M.*, which was duly served and returned. On the return day the justice, by mistake and supposing that the summons was returnable at *nine o'clock A. M.*, called the action at 10 o'clock A. M. and tried the same upon the testimony, and rendered a judgment in favor of the plaintiff. *Held* that the judgment was void for want of jurisdiction, and constituted no bar to a subsequent action for the same cause.

The day and hour fixed in the summons for its return is the period when the justice takes *jurisdiction of the action*, and not the time when he issues the summons. At the return day he is to receive the complaint, which shows the cause of action; and at that time the question of jurisdiction of the action is judicially determined.

The authority exercised by the justice, previous to that stage of the cause, in issuing the summons, is merely *ministerial*.

When a legal summons issued by a justice of the peace, has been duly served and returned, the justice, after waiting an hour from the time named in the summons for the appearance of the parties, obtains jurisdiction of the person of the defendant, whether he be present or not.

If justices proceed without having acquired jurisdiction over the parties in the form and in the manner required by law, any judgment which they may render will be absolutely void.

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THIS was an appeal from a judgment. The action was tried at the Columbia circuit, before Justice GOULD. The plaintiff's claim was upon a promissory note. A judgment was rendered for the plaintiff, and the defendant appealed. There was no dispute upon the facts. They are sufficiently detailed in the opinion.

John Gaul, for the appellant, (defendant.)

A. S. Rowley, for the respondent, (plaintiff.)

By the Court, POTTER, J. On the trial at the circuit the execution of the note, and its amount, were admitted. The defense set up was that the note had been previously prosecuted in a justice's court, and a judgment rendered thereon by the justice, which it was claimed, was a bar to this action. It was shown that a summons had been issued by a justice of the peace, November 28th, 1856, returnable 5th December then next, at *one o'clock P. M.* This summons was duly and properly served and returned by the constable. On the return day, the justice, by mistake, and in the belief that the summons was returnable at *nine o'clock A. M.*, waited one hour, and called the action at 10 A. M. and then proceeded and tried the cause upon testimony, and rendered a judgment for the plaintiff for the amount of the note, instead of waiting till 2 P. M. the proper hour. The justice's judgment was not appealed from. The justice, some five days subsequent to entering the judgment, on discovering his mistake, and at the request of the plaintiff, made an entry in his docket stating the fact of the mistake and declaring the judgment canceled.

At the circuit the judge held this justice's judgment void, and that it constituted no defense to the action in this court. To this holding the defendant duly excepted. This presents the whole case. It is claimed by the defendant that the justice had *jurisdiction* of the subject matter of the action, it

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being upon a note below \$100 in amount, and that by due and regular service of the summons he obtained jurisdiction of the defendant's person; that if the justice subsequently erred, his errors were *voidable* for the errors, not *void*; that the remedy for a voidable error is by direct review; and that this error could not be *collaterally* reviewed on the trial at the circuit. The *conclusions* from the premises I think cannot be disputed. The error lies in the unsoundness of the premises. The question of *jurisdiction*, I think, is not quite so easily disposed of as is stated in the above proposition. Although it is true that justices of the peace have jurisdiction to try actions upon promissory notes not exceeding \$100, still the judgment in such an action would be void, should the justice enter it before he issued the process, or the next moment after, or even while the constable had gone to serve the summons. So that having jurisdiction of the action in such case, means practically, that the justice has jurisdiction when it is properly before him. The same statute which gives him this jurisdiction restrains him from exercising it, except at a specified period of time. The 2 R. S. 233, *marginal paging*, § 44, 46,) declares that "*upon the return of a summons personally served the justice shall wait one hour after the time specified for the return of such process,*" &c. In respect of time, therefore, he is by express inhibition prevented from exercising jurisdiction over the action, until one hour after the time fixed by himself, and specified in the summons, unless the parties consent. When, therefore, we say a justice has jurisdiction of an action we mean, practically, that he has it when it is properly before him. The justice can have no *judicial* knowledge that he has jurisdiction of an action when he issues a summons; nor can he know it *judicially*, until the complaint sets forth the cause of action. The plaintiff may declare in an action on contract, trespass, trover, or he may declare in slander or assault and battery. He can see when the complaint is made, and not before, whether it is a cause that he has jurisdiction to try. It is the

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complaint put in at the time the law directs which permits him first *judicially* to know what the action is. This is the time appointed for the appearance of the parties in the summons. This is the first moment that the law permits him to take judicial cognizance of the action. It is this complaint that informs him whether he has jurisdiction to try the action. A justice has, it is true in one sense of the word, general jurisdiction to issue a summons, but the issuing of a summons is a mere *ministerial*, not a *judicial* act. (*Percival v. Jones*, 2 *John. Cas.* 50.) This summons is a mere notice to the parties, when and where it is proposed to have judicial action taken in the case. The day and hour fixed in the summons for its return is therefore the period when the justice takes jurisdiction of the action, and not, as is claimed, at the time he issues the summons. He had the *ministerial* authority, (which is claimed to be jurisdiction,) to issue the summons without regard to what the future complaint might be, and if on its return the plaintiff declares in slander or assault and battery, he then has no judicial action that he can perform, except to award costs against the plaintiff. When once the justice acquires jurisdiction he does not lose it. This theory therefore is not sound, that jurisdiction is obtained at the time of issuing the summons. It is obtained, if ever, at the time the statute allows the justice to perform the first judicial act in the case—the time of his examination of the summons to see if it had been so served and returned as to authorize him to act thereon. At this time he is to receive the complaint that shows the cause of action; this is the time that the question of *jurisdiction of the action* is judicially determined. That time did not arrive in the action set up in bar in this case, tried before the justice. That time did not arrive until after that judgment was rendered.

In looking at the confusion that is found in the language of some of the cases, I think it can be accounted for, in the difference of the character and nature of the different kinds of actions, and in the manner they are commenced. For

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instance, in an action commenced by attachment, where the first process is in the nature of an execution, the first act the justice is called upon to perform is a judicial one. The justice is prohibited from issuing this extraordinary kind of process, final in effect, unless he first judicially passes upon the nature, character and merits of the action in the following particulars: as to the sum due the plaintiff; whether or not the demand arises upon contract; upon the conduct of the defendant, whether or not he designs a fraud. All this he judicially determines upon evidence, *ex parte* certainly, but still evidence upon which he must adjudicate, before he can issue the process. In such a case, doubtless, the justice takes jurisdiction at the time of issuing the process. This case, however, is one of the exceptions. Nor is it a practical verity that in the ordinary case of the commencement of an action by summons, and by the service thereof, the justice obtains jurisdiction of the defendant's *person*. No case is cited to show that a justice, before the return day and hour named in the ordinary process of summons, can enter a good, or even a voidable judgment by which he obtains jurisdiction over the defendant's person. The prohibition in the above cited statute extends as well to the *person* as to the *action*. It would present an anomaly indeed that a court of inferior jurisdiction, in the face of such a prohibitory law declaring that they shall wait one hour after the time named in the summons, can notwithstanding, enter a valid judgment before that time, or one even voidable. The well settled rule that such courts are bound to show affirmatively their authority at every step until jurisdiction is obtained, is an answer to this proposition. There are doubtless loose dicta to be found in the books to the effect, "that jurisdiction of the person is obtained by service of process." This, as we have said, may be true in suits commenced by attachment, but it cannot be a universal rule. If it is ever used in reference to suits commenced by summons, it only means this, *that by the means*

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of legal process, duly served, the justice obtains jurisdiction. But when does he obtain it? At the time of service, or at the time the law authorizes him to act upon it? at the time the ministerial act of service was performed by a constable? or at the time the justice judicially determines it has been legally served? It seems to me to be absurd, in practice, to hold that the justice has obtained jurisdiction of the *person* of a party before he has obtained the power to act upon the jurisdiction so obtained. Such a power would be as useless to him as it would be dangerous to the public. If the justice obtains jurisdiction by the *service* of the summons, he might as well try the cause three days as three hours before the time of its return. And if the party injured in such case has no protection but by a review of the error by direct appeal, and may be compelled to give bail; or because there is no issue, to bring a common law certiorari to this court, when no costs are allowed him, it would produce a system of the worst kind of oppression.

I think, therefore, this loose dictum "that the justice obtains jurisdiction of the person by serving the process," not being universally true, even in theory, is too imperfectly expressed, to have it adopted as a law maxim. A consideration of its unsoundness for a single moment will show this to be so. If the service of the summons always gives the justice jurisdiction of the person, it would be immaterial whether it was served within the time required by law or not. The statute direction "that it shall be served at least six days before the time of appearance mentioned therein," would amount to nothing. A service of three days would be as good for that purpose as one of six. The contrary has been expressly adjudged. (*Stewart v. Smith*, 17 Wend. 517.) This unsound dictum, I think, should be checked before it travels any farther. The following, if not a perfect rule, would be an improvement upon this dictum. When a legal summons issued by a justice has been duly served, giving to the defendant notice by such service of the

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time prescribed by law, and such service appears by a proper return of the constable indorsed thereon, the justice at one hour after the time named in the summons for the appearance of the parties, having such summons and constable's return before him, obtains jurisdiction of the person of the defendant, whether he be present or not. When jurisdiction has been obtained, then the rule as to justices' courts is, that as to all matters of form, and as to the regularity of their proceedings, their acts are to be viewed with liberality; and for any error of judgment or mistake of law, their decisions cannot be reviewed collaterally, how erroneous soever they may be; but if they proceed without having acquired jurisdiction over the parties in the form and in the manner required by law, any judgment which they may render will be absolutely void. In this respect they must pursue the authority as it is conferred, or their acts will be a nullity. (10 *Wend.* 38.) Jurisdiction can always be inquired into in the proceedings of courts of inferior jurisdiction. The want of it is fatal. If these views are correct, then the judgment before the justice, interposed as a bar, was a nullity for want of jurisdiction, and the judge at the circuit properly so treated it. The attempt by the justice to cancel the judgment five days after entering it, was ineffective. He then had no power over it; there was no judgment to cancel. He had no power to cancel it if there was one.

I think the judgment should be affirmed.

[ALBANY GENERAL TERM, March 2, 1868. *Hogebloom, Potter and Peckham*, Justices.]

LEDLIE *vs.* VROOMAN.

A married woman, having a separate estate in lands, but not in the rents and profits thereof, not conducting any business on her own account, cannot charge such separate estate by a parol promise to pay the debt of her husband, where her separate estate has received no benefit on account of the contracting of the debt, and will not be benefited by the payment of the debt.

THIS is an action brought against the defendant, as a married woman, to recover two sums of money upon her promise to pay the same, and to have the amount decreed to be a lien and charge against her separate property.

Geo. Smith, for the plaintiff.

J. H. Cook, for the defendant.

POTTER, J. This case comes before the court upon the report of a referee, appointed to take and report the evidence. The plaintiff takes title to the demands by purchase, under an order made at a special term, on the application of the assignees of one William Baker, who made a voluntary assignment to them. The order purports to give authority to sell the assets of Baker, which assets included the claim in suit. By what authority the court made such an order, or how they obtained jurisdiction to make the order, is not shown. If no suit was pending in which it was made, the order is a nullity.

We leave that point for the present, and proceed to examine the case upon its merits; assuming that authority has been given. The evidence shows that the defendant is a married woman, the wife of Alexander Vrooman, of Canajoharie, Montgomery county. That she was the owner of a separate real estate, held in her own name and right; that her title to it was obtained prior to her marriage; and that she was married prior to the year 1848. She had no personal estate when married. There is no evidence of her being now

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the owner of personal estate liable to execution. She resides with her husband, who occupies with her her real estate, except certain portions which it would seem is rented to tenants. The real estate is managed by her husband; she does not carry on or conduct business in her own name. As to the above facts there is no conflict of evidence. The evidence is (by William Baker, the assignor of the claim) to the effect that in May, 1859, Alexander Vrooman, the husband of the defendant, went to Baker and said there was an execution against his property; that he could not get the money; and that his wife, the defendant, had sent him, to him (Baker) to know if he would let her have the money to pay the execution; and that Baker let him have it, to the amount of \$101.87. That in July following Vrooman, the husband, came again and said that the sheriff had advertised his property unknown to him, and his wife, the defendant, wanted him (Baker) to come up there immediately; that Baker went and saw the defendant; she asked him if he could arrange the debt upon which the sale was then about to take place, the execution being in the hands of Bromley, deputy sheriff, now deceased. Baker, at first, told her he had not the money, and promised to see Bromley, to get a few days time; Bromley refused to wait, by order of the plaintiff in the execution. Baker returned and told the defendant, who again asked Baker to raise the money in some way and pay the execution. Baker then told her he had already paid for her \$101.87. She replied, "that she knew that, and that he had been very kind to her; and that if he (Baker) would raise this, she would pay both as soon as she could get her rents, or sell her farm; and also, if he would pay this debt, she would pay him the first money she got." Bromley, the deputy sheriff, advised her that to keep off other executions, the property had better be sold and bid off for her; she assented, and the sale took place. Baker bid in the property and paid the amount of the execution, and left the property on the farm. Except that the property was sold and left on

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the farm, which is not disputed, every part and portion of the above evidence is positively contradicted by the defendant; especially as to her sending for Baker, and as to the promise to pay. The defendant adds, by way of additional evidence, that she did not receive the crops, nor rents of leases given for the lands rented; that she signed leases, but her husband managed the estate. This evidence of managing the estate is uncontradicted. In relation to all the testimony in conflict, except the promises of the defendant to pay, there is other evidence on the part of the plaintiff corroborating the testimony of Baker; and on the part of the defendant, there is the evidence of a statement made by Baker of the state of accounts; showing that a mortgage had been given by the defendant's husband to Baker, to secure demands against him, which are included in the demands in suit, as a debt against the defendant's husband. A question of law arises here, which we may first examine, viz., whether the plaintiff would be entitled to the relief demanded, if we assume the evidence on his part to stand uncontradicted. 1st. The debts in question paid by the plaintiff's assignor were not the defendant's debts; nor was she, except from her promise, bound to pay them, but they were the debts of her husband. 2d. Her separate property had received no benefit on account of contracting the debts so paid; nor did the evidence show that its payment benefited her said separate estate. 3d. No written agreement is proved, showing in itself that the defendant intended to charge her separate estate. 4th. The moneys paid by Baker were not shown to have gone to the direct benefit of the defendant's separate estate.

The defendant was not conducting any kind of business in her own name, or on her own account. True, there is no evidence in the case of the birth of issue of the defendant and her husband; and the marriage was prior to the acts of 1848 and 1849, in relation to the estates of married women; still this gave the husband the right to the rents and profits.

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of her real estate during coverture. (10 *Mass. R.* 263. *Co. Lit.* 351. 2 *Black. Com.* 433. 28 *Barb.* 362.) So whether there was or not issue born, the husband of the defendant had the rents and profits, by law, of her real estate. She had no separate estate in the rents thereof to apply in payment of the liability, which she promised to pay therefrom. If Baker relied on this promise, it was the promise of the defendant to pay the debts of another person, out of another person's property, and not out of her own. This would not be a valid promise in law, or a promise to charge her separate estate, and if the property bid in by Baker for her, had been paid for by her out of the rents and profits of her lands, it would have been paid for with her husband's money, and the property so purchased would, as a consequence, still have been his property, and could not in law have become hers. What is there then, in the evidence, that shows the intent by the defendant to create an express charge upon her separate estate? It could not be a charge upon her personal estate, for she had none; and being a married woman, her promise to pay for property purchased to create a personal estate would be void. Her title to the real estate was a legal one; it was a reversion, contingent upon her outliving her husband, descendible to her heirs in case her husband survived her. The acts of 1848 and 1849 had no effect upon this estate. (*Yale v. Dederer*, 18 *N. Y. Rep.* 265.) The disability of coverture prevented her from disposing of this estate directly, even by deed, except in conjunction with her husband. How then could she create a lien upon it, by parol, which by indirection might take it from her, or prevent its descending to her heirs, by a mere promise to become surety, or to pay a debt of another, the payment of which could not benefit her separate estate? Her promissory note, or other contract even under seal, for such purpose, would be void at law. The failure to show that this contract was for the benefit of her separate estate, and the doubtful evidence expressly contradicted, at that, of a

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promise to pay when she sold her farm; an act that she could only perform in conjunction with her husband, is too weak to sustain the case. Courts of *equity* do indeed allow married women, whose separate estates have been benefited, to charge them, and enforce the charge to the extent of such benefit, based on a desire by the court to do justice, and compel equity, but the debt of another, which has not so benefited her estate, I think can only be made a lien upon a legal estate by virtue of some written agreement, in a form that will reach and bind real estate. No promise of a *man*, orally made, will bind *his* real estate; why should not the oral promise of a woman have as much protection? The case of *Yale v. Dederer*, (18 *N. Y. Rep.* 265, *same case*, in 22 *id.* 450,) and the cases cited therein, I think, controls this case. The defendant has neither made a separate instrument binding her separate estate to pay a debt *not* beneficial to her estate, nor has she created an equitable charge upon it by pledging payment from it of a debt which is beneficial. It is urged that the modern spirit of legislation evinces a desire and intent to give to married women more absolute control over their separate estates than formerly. This is doubtless true, so far as relates to their estates acquired in a certain way, after those acts took effect, and so far as such control will *protect* their estates; but what is claimed in this case would hardly be a *protection* to them; on the contrary it would open a door by which worthless, insolvent and spendthrift husbands, who perhaps exercise as much control over the minds, the fears and the apprehensions of their wives as better disposed husbands could, and thus would control their estates, and thus might *exhaust* the separate estates of their wives by *their* improvidence. The protection of the disability of coverture, therefore, is still the best protection for them in this respect. This disability of coverture has not been removed by this modern legislation; certainly not as to estates previously acquired. If this view of the law is sound, we need not enter upon the labor of deciding upon the con-

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flicting evidence in this case. Taking it in its strongest bearing for the plaintiff, the case is not made out. The plaintiff would be permitted to have the case sent back to supply the defect of authority as to the power to make the order to sell the assets, if the law would still allow him to have judgment; but as it now appears this is unnecessary. The complaint must therefore be dismissed.

[SCHENECTADY SPECIAL TERM, July 6, 1868. Potter, Justice.]

WILLIAM E. MYERS vs. ELEANOR MYERS.

Proof of adultery, alone, is not sufficient to authorize a judgment of divorce.

It must be averred in the complaint that the adultery charged was committed without the consent, connivance, *privity* or procurement of the plaintiff; and the complaint must be verified by the oath of the plaintiff.

Where a plaintiff, in his complaint, alleged that five years had not elapsed "since he discovered the fact that such adultery had been committed by the defendant without his consent, connivance or procurement;" *Held* that this averment was not a compliance with the above rule.

Upon a reference, in an action for a divorce, it is the duty of the referee to find not only as to the fact of adultery, but also as to all other material facts, such as connivance of the plaintiff, &c.

No one has a right to relief from a court for an injury which he was himself chiefly instrumental in effecting. Upon this principle, connivance by a plaintiff at the adultery of the defendant, destroys all claim to remedy by way of divorce, though the adultery be proved.

Circumstances considered as amounting to proof of the plaintiff's consent to, *privity* with, and connivance at, the adultery of the defendant.

THIS is an action for a divorce. There are two counts in the complaint. *First*. That the contract of marriage was made on the 20th August, 1860, while the plaintiff was under duress of imprisonment; and *Second*. For adultery of the defendant, committed 16th January, 1862. Issue was joined by a denial of the allegations in the complaint, not under oath. A referee was appointed to take the evidence, and to report the same with his opinion; and the case came before the court upon the evidence, and the report of the referee.

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McIntyre Frasier, for the plaintiff.

A. H. Ayers, for the defendant.

POTTER, J. No objection was raised to the complaint for multifariousness: and no evidence was taken under that count. We may regard it here as abandoned. Though the referee reports that the marriage was voluntarily entered into on the part of the plaintiff, and not by compulsion or threats; and that at the time of the marriage the plaintiff was under arrest on a warrant issued on the application of the superintendents of the poor of Montgomery county, as being the putative father of a bastard child, of which the defendant was then pregnant. The referee also reports, as his opinion, that the defendant has committed the adultery charged in the complaint, with one Charles Wood.

From the evidence it appears that the marriage was consummated no further than by the usual marriage ceremony, and not by subsequent cohabitation; the parties never having lived together, but separated at the time of the ceremony, and remained separate, and resided, the plaintiff at Amsterdam, and other places, and the defendant at Fort Plain, 25 or 30 miles distant, ever since the ceremony.

I should have serious doubts whether, upon the evidence as reported, I could bring myself to the same conclusion as did the referee, on the question of adultery, under all the circumstances of the case. If she is guilty, it is to be presumed from circumstances all transpiring on one occasion entirely disconnected with the usual and ordinary accompaniments of this offense, of friendship, intimacies, repeated instances of imprudent behavior, lewd conduct, &c. Presumptions based upon uniformity of, or continued improprieties, and suspicious intimacies with one individual, are much stronger than the presumption arising from a single circumstance unaccompanied by previous or subsequent impropriety of conduct. Excluding the fact of pregnancy prior to the

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defendant's marriage, which is to be regarded as legally cured by the marriage, the case is left uncorroborated by the usual evidences; nor, except on one occasion, are there any strong circumstances from which to presume adultery against the defendant. She stands then, as to her guilt or innocence, with strong presumptions against her *only* in one case, and on one occasion, weighing against otherwise a fair reputation; and her positive oath of innocence. Nor this alone; it also appears in the evidence that she by her counsel attempted to secure the attendance as a witness of Charles Wood, the individual with whom the adultery is charged to have been committed, and that her counsel was entirely unable to secure his attendance, or to find him at Syracuse, his last known place of residence; but her counsel found upon inquiry that the plaintiff's father, who resides at Amsterdam, Montgomery county, had been at Syracuse a day or two previous; had seen and talked with Wood the witness; that they had gone off together, and Wood had not been heard of afterwards; and the father of Wood, of whom information was sought, told the defendant's attorney that Wood the witness had promised the father of the plaintiff that he would not be at the said hearing as a witness on said adjourned day. As the plaintiff's father had been a witness himself on the former hearing, for his son, and had testified to the fact that his son, the plaintiff, resided with him at Amsterdam, and that he, the father, had seen his son and Wood together at Amsterdam about the time of the alleged adultery; and as from this relationship and knowledge he may be presumed to know the importance of Wood's testimony, he may also be presumed to know that if the charge of adultery was true, and without any connivance, the testimony of Wood would not injure the plaintiff; but if untrue, or, if Wood's conduct was part of a scheme of conspiracy against the defendant, that it was necessary to keep him away. Added to the fact of relationship, intimacy, and knowledge of the plaintiff's father, the circumstances are sufficient to justify a suspicion of combination and fraud in

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this regard, and the testimony for this purpose was admissible; and in this view, the circumstance has great significance, but it adds nothing in favor of the presumption of the defendant's guilt, but the contrary.

But in the light in which I look at this case, the plaintiff has failed to make out his case, even conceding the opinion of the referee on the question of adultery could be sustained by evidence. Proof of adultery alone is not sufficient to authorize a judgment of divorce. The 86th rule of this court, which has ever been a part of the law of divorce in this state, and I believe also in England, provides, "that in actions of divorce on the ground of adultery, unless it be averred in the complaint that the adultery charged was committed without the consent, connivance, privity or procurement of the plaintiff, &c.; and the complaint containing such averment be verified by the oath of the plaintiff, &c. judgment shall not be rendered for the relief demanded, until the plaintiff's affidavit be produced, stating the above facts." To this effect is 2 R. S. 145, § 55, [42.] *sub.* 1. The plaintiff has produced no such affidavit, and he has not averred any such fact in his verified complaint. There is a statement in the complaint, which it is claimed was intended for that purpose, but which cannot be admitted to be sufficient. The statement in the complaint is in the following language: "*that five years have not elapsed since he discovered the fact that such adultery had been committed by the defendant without his consent, connivance or procurement.*" To say nothing of the omission of the word "*privity*" contained in the rule, this statement amounts to no allegation that the adultery was committed without his "consent, connivance or procurement."

It is only an allegation that he had not *discovered* it to be so. Very likely! Perhaps he never will discover it to be "without his consent, connivance or procurement." If he had consented, connived at, or procured the adultery to be committed, he could have taken, with truth, this very affidavit; that it was not five years since he discovered it. That

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tiff staid, without being seen by his wife and Wood, till they were at breakfast, when the plaintiff peaked into a partly opened door; saw them at breakfast, and then departed. This night is the time when the adultery in the complaint is charged to have been committed. The evidence, unexplained, might prove it. But if true, connivance destroys the effect. Connivance destroys all claim to remedy by way of divorce; and is founded on the obvious principle that no man has a right to relief from a court for an injury which he was chiefly instrumental in effecting, himself. (*Shelf. on Marriage and Divorce*, 449.) Bills have frequently been dismissed on this ground, where adultery has been fully proved. (*Timnings v. Timnings*, 3 *Hagg. Eccl. Rep.* 76.) A man must come with pure hands himself, in this respect, before he can exact due purity on the part of his wife. The evidence to prove connivance is generally circumstantial. There were circumstances in this case that required explanation; none was given; it was in the plaintiff's power to give it. For what did he and his intimate friend Wood, leave Amsterdam together? For what did they again appear in private consultation in Fort Plain? How did he know the defendant was going the next day on the cars? How did he know where his friend Wood, and his wife, were to be the next night? Why was not Wood a witness? This is too transparent a fraud, I think, in all its features, to be seriously presented to a court for their sanction. It would be a poor compliment to the intelligence or to the judgment of a judicial tribunal, to suppose it could adopt this state of facts, and give a judgment in favor of the claim as being consistent with honesty and fair dealing. A court would be unworthy of its position if its perceptions were so dull as not to perceive, or so indifferent as to wink at, such an attempt upon a weak, perhaps erring woman. The case may not be as bad as it seems; but it appears to me to be a most bungling, not to say a wicked conspiracy and connivance. The bill must be dismissed with costs.

[SCHENECTADY SPECIAL TERM, July 6, 1863. *Potter*, Justice.]

THE PEOPLE, *ex rel.* Robinson, *vs.* FERRIS and others.

After an appeal from the determination of commissioners of highways in laying out a highway has been heard before the referees appointed by the county judge to decide such appeal, and submitted to them for their decision, they have no power to reopen the case and receive further testimony. After the matter of the appeal has been submitted by the parties to the referees, their power for further *hearing* is at an end. The only power then left to them is to decide; which includes the incidental powers of adjourning from time to time, for that purpose, and to sign and cause to be filed the evidence of their decision.

THIS is a common law certiorari to review the proceedings of referees appointed by the county judge of Washington county, to decide an appeal brought by the relator, from the determination of the commissioners of highways of the town of Argyle, in laying out a highway through the lands of the relator. There was no question arising as to their appointment, or as to the regularity of their acts, until after they had heard the proofs and allegations of the parties. At the time of hearing these proofs, the parties and their counsel present, after taking certain testimony, agreed upon the number of witnesses that should be sworn, and who were accordingly sworn and examined by the parties in pursuance of such agreement; and the *commissioners* and *appellant* then submitted the matter to the referees for their decision. This was July 15th, 1857. No adjournment was asked for by either party for the purpose of offering more testimony; the referees adjourned indefinitely as to time, but fixed Sandy Hill as the place to meet, to make their decision; and two days afterwards, to wit, the 17th of July, 1857, they did meet for the purpose of deciding the same. Upon consultation, two of the referees were of opinion that the opening of the road was not of sufficient importance to justify the expense of opening it. *One referee came to no conclusion, for want of sufficient evidence.* It was then agreed between two of them, that one, to wit, Weston, should draw up a decision in blank, and that Ferris, the other referee of the same opin-

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ion, should take the paper and fill certain blanks therein ; but it was not to be signed, nor any final decision made, until another meeting should be had, on an adjourned day. Weston drew up a blank decision in form, reversing the determination of the commissioners, and they adjourned. Ferris took the blank decision, filled it up, and signed it: *Before* the adjourned day arrived, but not on any appointed day, and on what day does not appear, several of the inhabitants of the town of Argyle appeared before the referees at Sandy Hill, and upon affidavits which set forth their reasons for so doing, they applied to the referees to have the hearing opened, and to take further evidence in the matter, upon the merits. At the adjourned 'day, last before mentioned, the referees again met, and then two of the referees refused to decide the appeal, and adjourned to a future day, and then information was given to the relator's son, of the application that had been made by citizens to open the hearing. The referees again met July 24th, 1857, and Gilbert D. Robinson, the relator's son, who appeared for him, requested them to suspend their decision upon such motion till the 7th August, then next, to give him time to interpose legal objections to granting such application. Their decision was then postponed to August 7th ; on which day the relator, by his counsel, objected to a further hearing, and insisted that they could not entertain such application without affidavits, &c. Two of the referees then decided that such affidavits should be presented. The commissioners' counsel then read affidavits of five inhabitants of Argyle, in favor of the application to open the hearing. The relator's said son then asked for time to determine whether he could furnish counter affidavits. The referees then again adjourned to August 14th, at which time the parties agreed that the time for this purpose should be further extended to the 10th of October. On which last day the relator's counsel objected to the further hearing of the appeal. First, that they had no right ; and second, if they should hold that they had the right, that this was not a

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proper case to exercise it; and he read the affidavits of eight persons for that purpose. The counsel for the commissioners then proposed to read affidavits in reply, which was objected to, but allowed by the referees; and they were read. Arguments against allowing the application, and in favor of it, were then made, and another adjournment to the 19th of October was made, to allow the relator's counsel to furnish authorities in reply, which being furnished in writing on the last day, two of the referees, all three being present, decided to open the case, and grant a further hearing of the appeal, and appointed the 25th of November, 1857, at a certain place for the purpose, and written notice was given to the relator's counsel, but no other notice was given to the relator. On which last mentioned day, on account of sickness of the relator's counsel, a further adjournment was had till December 15th, 1857. On that day, all the referees being present, and the counsel of the parties being present, the relator's counsel again objected before the referees to receiving any further evidence on the part of the commissioners, on the ground that the matter had been before the referees; testimony heard and closed; and the matter submitted to them for consideration; and considered and passed upon by them; and that they had no power to reopen the case and receive further testimony. These objections were overruled by the referees, and the relator excepted. The commissioners then proceeded and offered new evidence; the case was again adjourned from time to time; the relator's counsel remaining and cross-examining witnesses, raising objections, and calling and examining witnesses on his side; proofs were again closed on the 10th of January, 1858. Various meetings of two of the referees were had, and adjournments were made until the 26th of January, 1858, when all three of the referees were present, two of whom decided to *affirm* the determination of the commissioners; Ferris refusing to sign the decision; and the decision was filed in the town clerk's office of Argyle January 29th, 1858. This decision being considered by them as defective in form, inas-

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much as it did not show upon its face that all the referees were present, or had met at the time it was made; the two referees who did sign it, afterwards, on the 5th of February, 1858, without concurrence, consultation with, or notice to, the other referee, filed a supplemental order or statement, showing that all the commissioners were present, and they annexed this supplement to the decision. These proceedings are brought up for review.

U. G. Paris and J. S. Coon, for the commissioners.

A. L. McDougall, for the relator.

By the Court, POTTER, J. The referees in this case acquired jurisdiction of the matter by their appointment, and they then possessed all the powers that were formerly possessed by three judges of the common pleas of the county, under the provisions of title one, article four, chapter six, part one of the revised statutes. It is necessary, therefore, to look at the statute referred to, in order to see what powers such three judges did possess. By § 87, 1 R. S. 518, notice was required to be given to the commissioners, and to one or more of the applicants for the road, specifying the time and place at which the judges (now referees) will convene to hear the appeal. This was done. By § 88, p. 519, eight days' notice was required to be given, of the time mentioned therein, to the commissioners and applicant; and the manner of service is specified. Of all this there is no complaint. By § 89, "It shall be the duty of the judges to convene at the time and place mentioned in the notice, and hear the proofs and allegations of the parties. *They shall have power to issue process to compel the attendance of witnesses, and may adjourn from time to time as may be necessary.*" All the power that is expressly conferred to direct or control the action of the referees upon the hearing, or as to the mode of conducting the appeal, is above stated. Every other

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power which they can exercise must be such as is incident to their express powers. The effect of their action within their power need not at this place be referred to. It is their duty to hear; it is also their duty to determine; and they are empowered to compel the attendance of witnesses; about which no question is raised; and all power conferred beyond this is, "they may adjourn from time to time, *as may be necessary*." So far as adjournments were in question, there was no limit, so long as adjournments were *necessary*, which was a matter of discretion with the referees. They had most undoubtedly this power; but adjournments *for further hearing* were no longer necessary in this case, after the case had been submitted. There was then an end of the *hearing*. It was then left with the referees for *decision*. Their adjournments for the decision were perhaps *as necessary* as for the hearing, and the power to adjourn I have no doubt still continued, as a necessary incident of the power to decide. They entered upon the duty of deciding. They, or a majority of them, agreed upon some things in the way of deciding. They adjourned to meet again. A form of decision *reversing* the determination of the commissioners was prepared by one referee, and signed by another in accordance with the general views of these two of said referees, to be presented at the next meeting then appointed for the decision of the case. These facts, though they fall short of constituting a final decision, and which decision it was agreed should be deferred, are stated merely to show that the referees had then, in their own minds, *closed the hearing*, and had entered upon that part of their duty which required them to *decide* upon such hearing. Between the two periods, that is before the next day of meeting to decide, several inhabitants of the town of Argyle, not parties recognized by the statute as having a right to be heard as parties, obtained a meeting of the referees, not on an adjourned day, and made an application to them to have the hearing opened; using such arguments and reasons as were calculated to influence the action of the referees.

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This, though perhaps not so intended, was a most officious, improper and meddlesome interference with the rights of parties to a proceeding who were not present, and a tampering with the opinions of a body of officers acting upon their oaths, intrusted with the performance of solemn judicial duties, and the decision of important interests of the citizens. The courts should never look but with disapprobation upon such direct interference with the action of bodies upon whom the law has cast the power of disposing of, or affecting the property or interests of others. A justice of this court, or any other, would frown upon any such attempt upon him, and would punish as for contempt any such interference with a jury; and referees in a such case are not an exception. And though good faith, as it is claimed, may have been the moving principle, the precedent is dangerous, and should not be sanctioned or tolerated. The fact that one of the referees, who before that, at the last regular meeting, had drawn up a written decision of the case, had at the next adjourned day so changed his mind as to agree to deliberate upon the application so improperly made, is far from proving that such interference did not influence the decision. Though the return does not show it, the opinion of the referees may have become known outside; and if the application may be based upon such a state of things, a case is never settled or submitted. Though the faith of the parties may be pledged to a submission, interested individuals outside will not fail to open litigation, so long as either party is informed that weak points may be strengthened, or that the testimony of some witness should be impeached; that the weight of evidence against him before the referees must be changed. If such a practice could be tolerated such motions will be the order, and endless litigation the result; and if upon another hearing the weight is found in the other scale, another opening of the case will be applied for, and for the same reason it should be, but may not be granted; and this court would possess no power to correct the abuse. At this period of time the

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real question in the case arises, to wit, the question of power. The question of necessary adjournment for the hearing had once been closed; all the discretion granted for that purpose had once been exercised and exhausted; the necessary adjournments for the purpose of deciding the case they doubtless still possessed, but even that discretion for the purpose of *deciding*, had now come to an end by their action upon this new view of the case, so improperly brought before and taken by the referees. Notice of this application of citizens of Argyle, before the referees, was given to the son of the relator only, and at a further adjourned meeting this son appeared and requested a withholding of their decision upon said application, to enable him to interpose legal objections, which being granted he did interpose his objections to their entertaining a motion for a further hearing. The objection was overruled by two of the referees, and they then and there entertained a motion upon affidavits, without the previous service of copies thereof upon the relator, but then adjourned to enable the relator to determine whether he would present counter-affidavits; and for reasons of convenience to parties several adjournments were had without action, and at the next meeting the relator's son again urged his objections to the power of the referees to open the hearing. Finally, this being overruled, he read affidavits to show that it was not a proper case for the exercise of such power. Replying affidavits were admitted. All these affidavits are returned with the writ.

By reference to these affidavits it is seen that those which were read in behalf of the commissioners and applicants for the road are affidavits impeaching the evidence offered on the hearing on the part of the relator, and cumulative evidence on the other side. The referees decided the motion in favor of granting a further hearing. The question now fairly arises, does the power granted by the statute authorize this proceeding by a body known in law as one of inferior and limited jurisdiction? Is the power to hear and decide such a motion, necessarily

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incident to the power granted, which is power to adjourn for such further time as shall be reasonable? Is it absolutely necessary to the due administration of justice that they should exercise such powers? As no precedent can be found in the books of authority—no rules regulating such a practice—as these officers possess no powers by implication, but are, like all other inferior and subordinate officers and tribunals that are creatures of the statute, I think they are confined to the powers *expressly* conferred, or such as are necessarily incident to such conferred power. And as in all proceedings which may deprive a party of his estate, they are to be held to a strict construction of the statute, I have not been able to see in the features of this case that it is one that requires to be made an exception to the general rule, and to those long established safeguards to property. It is not necessary to say, in deciding this case, that there are no circumstances that would authorize such referees to open a case for a rehearing, if by accident or mistake one of the parties had been deprived of any hearing whatever, or even of but a partial hearing. It may be that such a power is incident to the power granted, and absolutely essential to the due administration of justice; as accidents and mistakes must and will occur, where no human foresight can guard against them. But that is not the case here, and no such question is to be decided. This case had been heard upon its merits and submitted upon the faith of the parties who had a right to be heard, and upon the advice of counsel, and the duty of deciding had been entered upon by the referees, and then not on account of any accident or mistake, or default, but because persons not recognized as parties to the proceeding, and who had no right to appear at all, either because they had heard, or because they suspected the weight of evidence was against their wishes and interests, asked to have the case opened. For what? To impeach some of the testimony standing in their way, and to add to the weight of evidence on the other side. A court of original jurisdiction having the power, would have denied such a motion,

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and would doubtless have rebuked the application. Such a power as has here been exercised by the referees, is not within the contemplation of the statute conferring the power, and would be a dangerous one to intrust to such a body, as is sufficiently demonstrated in this case. There is no case of precedent cited; and I have not been able to find a reported case where such authority has been exercised. The powers even of referees for the trials of civil causes which are commenced in the highest courts, and whose actions and conduct have ever been under the control of the courts, have never until recently been extended so far; and even they are subject to review by the court. They are not authority for this proceeding.

It is sufficient to say, that when the matter was submitted to the referees by the parties, their power for further *hearing* was at an end. The only power then left to them was to decide; this included the incidental power of adjourning from time to time for this purpose, and to prepare and sign, and cause to be filed, the evidence of their decision. All proceedings to open the hearing, and all further hearing of the matter after the first submission, were without authority. They had no jurisdiction to open the case; they had lost all further jurisdiction to hear it upon the merits. All action following the motion to open was void.

It is not necessary to discuss the effect of the decision signed by two of the referees, nor of their power without consultation with their associate, to amend it. It is perfectly clear that their change of opinion upon their subsequent action was based upon such subsequent proceedings. The result is, their whole action must be vacated and set aside.

Ordered accordingly.

[SCHENECTADY GENERAL TERM, JANUARY 7, 1862. James, Rosentrans and Potter, Justices.]

HICKOK vs. THE TRUSTEES OF THE VILLAGE OF
PLATTSBURGH.

Where the legislature, by special statute, declares that all streets, roads and alleys in a particular village which have been worked and improved and which are now used as such, shall be deemed public highways, the character of the streets, roads and alleys, and whether highways or not, is thenceforth to be determined not by the rules of the common law or the general statutes relating to highways, but by inquiring simply whether, as a matter of fact, any particular street or alley comes within the provisions of the statute.

Overseers of highways, acting under the general authority of the trustees of a village, who are by law commissioners of highways, and without directions as to the specific application of labor, under their warrants, may create a liability on the part of the trustees, by applying the labor to the improvement of a particular street.

Unless such acts of the overseers are repudiated or disavowed by the trustees, they will be presumed to have ratified them.

The question whether a *cul de sac*, or a road or street which is closed at one end, and only communicates with a public road or street at the other, can be a *highway*, discussed.

ACTION by the plaintiff to recover for injuries received in traveling through Church alley in the village of Plattsburgh, which was out of repair. The defense was that Church alley was not one of the streets or alleys of the village. The facts sufficiently appear in the opinion.

Wm. A. Beach, for the plaintiff.

Parker & Armstrong, for the defendant.

By the Court, POTTER, J. The amendment of the act incorporating the village of Plattsburgh, passed April 12, 1848, (*Laws of 1848, ch. 291*), provides that "all streets, roads and alleys within the said village *which have been worked and improved* by the trustees of the village or the commissioners of highways of the town of Plattsburgh, *and are now used as such*, shall be deemed public highways." This was a special legislative enactment that all the streets, roads and alleys in that village should be thenceforth public

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highways, if brought by this act within certain conditions. It is therefore really unimportant, under the special provisions of this statute, to enter upon an inquiry as to what constitutes a highway at common law; or whether a *cul de sac* can become a highway by dedication and use, or even as to what constitutes a highway under the general highway statutes of this state. *These* streets, roads and alleys, are made highways by special statute provisions, applicable to the streets, roads and alleys within the village of Plattsburgh that have been worked and improved by the trustees of the village or by the commissioners of the town, and only to those that were then used as such. Unless this statute was intended to change the common law and also the general highway statute, in their application in particular to the streets, roads and alleys in that village, the 4th section of the act of 1848 is worse than surplusage. Why should the corporation ask for, or why the legislature enact, that the common law, and the existing statutes in relation to highways, should apply to the streets, roads and alleys of the village? They would apply, without this special enactment. The very fact that this *special* statute provides that those streets, roads and alleys *should be deemed highways*, in case they came within the terms of the act, implies and presupposes that at least some of them, by reason of not being laid out in compliance with the statute, and their having been of less than twenty years' use, were *not then* public highways. If, according to the settled rule of construction, the provisions of this statute must be made to mean something, this is its meaning. The character of these streets, roads and alleys is to be determined, not as is urged by discussing the common law or general statute provisions, but by inquiring simply whether as a matter of fact, any particular street or alley comes within the special provisions of the fourth section of the act of 1848. These inquiries then become questions of *fact*, having reference to the *time* of the taking effect of this statute, (to wit, twenty days after its passage,) viz: 1st. Was the *locus in quo*,

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at the time of the taking effect of the act of 1848, an alley within said village? 2d. Had such alley at that time been worked and improved by the trustees of said village, or by the commissioners of highways of that town? and 3d. Was such alley, at said time, used as such? If there was a conflict of evidence upon either of these facts, it was a question that of right should have been submitted to the jury, and if found in the affirmative, the plaintiff ought not to have been nonsuited. The next subject of inquiry is whether there was any evidence to sustain either of these facts. The plaintiff asked to go to the jury upon the questions of fact appearing in the case. The judge at circuit refused this, upon the law as settled at the general term when the case was here before; regarding the facts as not being *materially* changed, and therefore granted the nonsuit. As the learned judge who granted this nonsuit was not a member of the general term when the judgment was set aside, it is but justice to him, as well as to the case, to say that it is not an easy matter now to declare with certainty what was settled at the general term. Two of the three members of the court concurred in a *conclusion*, though not entirely for the same reasons, that there was error enough committed on the trial to order a new trial. One of the three justices *then* dissenting from this conclusion. Having now arrived at a conclusion upon the case, different in result from my conclusion upon the former case, it is but just to state the grounds, to prevent what might be regarded as an inconsistency of opinion. Upon the former trial the judge charged the jury at considerable length, and among the propositions of his charge, I thought there were some errors, though in the main the charge was correct. The charge was excepted to, but the exception was so general that it did not bring up any part of it for review; but the counsel for the defendant then presented two propositions which he requested the judge to charge, and which in my judgment were clearly legal and proper to be charged, and which the judge refused to charge, and exceptions were duly taken. For

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these errors alone I felt bound to vote for a new trial, and so stated, in a short opinion written on that review. Those errors are not in the present case. In regard to the questions of fact upon the last trial there was doubtless sufficient evidence on the point of dedication of Church alley, to have submitted it as a question to the jury, whether Church alley existed as an alley of the village when the law of 1848 took effect. This was one of the conditions of the special act necessary to make it a highway. It was at that time used as a traveled way by the public for the ordinary purposes of a street, not only by residents living and transacting business upon it, but by public stages and trucks passing through it to and from other business portions of the village, as the nearest and most direct way. It was therefore, within the express language of the 4th section of the act of 1848, "used as a highway," or at least as "an alley." But there is more than this; unless I am mistaken in the application of the facts. The book of records of the trustees produced in evidence shows an official recognition of this alley, by a resolution passed at a meeting in August, 1840, "*to repair a drain across the street near E. Buck's store.*" It appears by several witnesses that E. Buck's store was on Church alley. Three days after the law of 1848 took effect, to wit, 5th May, 1848, the trustees by a resolution fixed a location on "Church alley," as a location for a public pound for the village. This was a cotemporaneous recognition of it as an "alley" for a public purpose. There are other indirect official recognitions in ordinances and otherwise. The main, or rather the most controverted issue in the case, is whether at the time of the taking effect of the statute of 1848, this alley had been "worked and improved by the trustees of the village." If it had, the plaintiff was entitled to have his case go to the jury. I am compelled to say that I find in the case now before us not only evidence tending to prove, that this alley had been so worked and improved by the authority of the trustees, but evidence to such an extent that it was error not to have sub-

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mitted it as a fact to the jury, and this without fault of the judge who tried the case, as before stated. It was rather the result of a concurrence of circumstances which made a new trial on the former case necessary, without settling the law of the case. Upon this point there was evidence tending to prove that the trustees had improved this alley. They had issued the warrants to the overseer of highway work, without any direction as to its local application; in other words, they left these officers like pathmasters in towns, to exercise their own discretion within their assigned districts as to the application of the work. The act of the overseer might or might not be the act of the trustees, depending upon whether he exceeded his powers. If performed without their direction and authority—and certainly if in violation of it—it would not be binding; but if without dissent, or with implied assent, or with subsequent express or implied ratification, it would be binding, and be in law the act of the trustees. The circumstances which either prove or disprove this assent or ratification are appropriately matters for the jury.

There is another view of this case, which from its several trials, its long continuance in the court, the importance to the parties that it should be finally determined, and that the law which controls the case should all be so settled as to prevent, if we may, much more litigation, may make it proper to look at another question of law which arises in the case; and which was discussed by the learned judge who wrote what is called the prevailing opinion on the former review. A contingency may happen, to make it necessary. If the plaintiff should fail to prove, on a future trial, that this alley was made a public highway by official compliance by the defendant with the conditions of that special act of the legislature, I do not see that he would be estopped from proving that said alley was still a public highway; made so by either of the other modes, to wit, at common law, or under the general statutes. If the alley in question was a highway at the time of the passage of the act of 1848, then it required no evidence on the

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part of the plaintiff of improvements made or work bestowed upon it by the trustees in order to create the liability to him. If there had been a dedication of this alley by the landowner for at least twenty years prior to the passage of the act of 1848, for the use of a road, and it had for all the intervening period been used as a public highway, it became a highway as well at common law as by the provisions of section 135 of the general highway act, and it then became the duty of the trustees to keep the same in repair. (*Id.* § 1.) And by subdivision 7 of the same section, it was made the duty of the trustees as such highway commissioners to order all necessary work to be done. Whether it had *thus* become a highway, might also have been a question of fact proper for the jury. These provisions of the statute are but the enactment of what was before the common law. (24 *Wend.* 492. 3 *Kent's Com.* 451.) There was evidence of its being used in part, or at one end, for more than twenty years. Whether dedicated for the use of a road, the purpose for which it was used—and the extent of its use—may also be questions for the jury; and a continued user for twenty years warrants the presumption of dedication, by the owner, for the purpose for which it has been used; and the acts or acquiescence of the owner, as well as the use, and its purpose, are all questions of evidence to be passed upon as facts if there shall be a conflict. (See *Pearshall v. Post*, 20 *Wend.* 111, and cases cited; *S. C.* 22 *id.* 431.)

There is but one question more that I deem it necessary to notice. It has been argued before us that the alley in question was, until it was extended somewhere about the year 1841 or 1842, a "cul de sac;" that it was closed, by its termination at the west end against the unimproved lands of the Briuckerhoof estate; and that up to the period last named, it could not therefore be a public highway. If, on the trial, this question is reached, under this last view of the law of the case, then it is important that this question of a cul de sac should also be examined and passed upon. The evidence on the last trial, as well as on the former, establishes the

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facts that are assumed by this proposition. Whether a "cul de sac" can, or cannot be a public highway, depends upon the common law, and not upon statute. To find the common law on the subject of a "cul de sac," we are chiefly and of necessity driven to the English common law authorities, as by reference to our own in this state, no case directly in point is cited, and I have found none within the limits of my own examination. There are two or three modern cases, in which the law relating to a "cul de sac," has been discussed, and obiter opinions given. (*Wiggins v. Tallmadge*, 11 Barb. 457, and *Holdane v. Trustees of Cold Spring*, 23 id. 103; *S. C.* 21 *N. Y. Rep.* 474.) In the court of appeals, in the last cited case, the question was not before them directly for decision, and they decided the case upon another point. It was there decided upon the question of insufficient evidence of dedication; and the court below were divided upon the question of a "cul de sac." In *Wiggins v. Tallmadge* the court were also divided, the other way; and in neither case was the question directly and necessarily before the court to be decided. Whether a road or street which is closed at one end, and only communicates with a public road or street at the other, is susceptible of dedication to the public use as a highway, remains still, upon authority in this state, as much an unsettled question as ever. And the English cases did seem strikingly in conflict. The American and English authorities are fully collected and examined by Hand, J. in *Wiggins v. Tallmadge*, relating to every class of highways, and he comes to the conclusion, in which Willard, J. concurs, that a "cul de sac" may be a highway; while Emott, J. in *Holdane v. Trustees of Cold Spring*, Brown, J. concurring, upon examination of a part of the same authorities, arrives at a different conclusion. Were I to examine this case upon principle, as I think we are at liberty to do, I should hold that wherever the public convenience demanded it, whatever might be the particular form or shape required, or its terminus, a highway can be established, by dedication

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and user ; or by the public authority. To hold as a principle of settled law that a highway must of necessity be a thoroughfare, that is, that it must connect at each terminus with some other street, or rather to be infinite, having no termini, is not consistent in frequent instances with public convenience, and has not a basis of good sense to sustain it. Many of our public streets, in populous towns and cities, with which I am acquainted, abruptly terminate upon rivers disconnected with ferries, or public streets upon the opposite banks ; and are compactly built up, inhabited and used for every purpose of a highway, to high water mark. These cannot be thoroughfares. Are not these therefore highways ? They have been so regarded from a period whereof the memory of man runneth not to the contrary. Suppose what is called a court, of a square or circular form in a city, the entrance whereof is from but one public street. If it be built up, and occupied and used for the same business purposes of every other street of the town or city, if the way which passes in front of the business establishments thereon is open to all the public who choose to travel over it for business or pleasure ; if the public stages, trucks, and other public vehicles of business, or pleasure carriages, use it in the same manner as all other streets are used ; if its inhabitants are taxed and assessed like other citizens for highway labor ; does the mere fact that the egress must be at the same opening as the entrance exclude this business part of a city from having this as its highway ? I am unable to see a reason for establishing it as a technical legal rule, that a highway *must* be a thoroughfare. It is impracticable. A journey upon a way around the globe, if it could be on terra firma, upon one line of latitude, would bring the traveler out at the point of starting. A road upon this line, upon such a principle, would be neither a highway nor a thoroughfare. It would like a cul de sac, only open into itself. Undoubtedly there are a class of cases where a way may be dedicated by an individual or by individuals, leading only to private dwellings, or into the fields, which from the

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intent of the dedication, and the purposes of their use, would exclude them from being classed as highways. It is in the ascertainment of the purpose which distinguishes these from the other, and which is not always easy of determination, that has produced the apparent conflict of cases found in the books. We are then in this state without common law, except such as we borrow from the English cases upon this question. The opinions of a majority of two co-ordinate courts cited, are found to differ in their construction of the English cases. In a case in the English court of queen's bench, later than either of the cases reviewed by Justices Hand or Emott, (*Bateman v. Bluck*, 14 *Eng. L. and Eq. Rep.* 69,) decided as late as in June, 1852, that court has reviewed the cases which are supposed by our judges to be in conflict. They have settled that conflict, and have laid down, as I regard it, a very sensible view of the law. The simple proposition therein decided, is, "that a public highway may, in point of law, exist over a place which is not a thoroughfare." That case was not a thoroughfare. The issue was left to the jury, who found a highway existing over the place in question. Lord Chief Justice Campbell said, "We must take it that this is a good finding on this issue, unless there cannot in point of law be a highway where there is no thoroughfare. *Now such a position cannot, I think, be supported.* There may or there may not be a highway under such circumstances." And he adds, "that he does not find that the case of *The Rugby Charity v. Merryweather*, (11 *East*, 375,) has ever been expressly overruled." "It seems to me that it rests on the principle of convenience." (*Id.*) And "this is not inconsistent with what is laid down by Hawkins and other text writers on the subject." This was concurred in by all the judges in that case, who express their opinions to that effect. That of Erle, J. being in brief, as follows: "The question is whether there can be in law, a highway where no thoroughfare exists. It seems to me clear from the authorities, that there can be such a highway, and convenience requires that this

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should be so. It is for the jury to consider whether on the whole of the facts proved, they will presume a dedication to the public." *We* have no right further to differ about the meaning of the English authorities. They have settled that difference in their own courts. We certainly have not adopted a different rule, by express adjudication. The good sense of the rule which accompanies the decision I concur in. It is the only practical rule that can be established. If I am right in these views, then the nonsuit should be set aside, and there ought to be a new trial, with costs to abide the event.

[CLINTON GENERAL TERM, May 5, 1863. *Potter, Boeckes and James, Justices.*]

 SINGER vs. SINGER.

The court will order any judgment for divorce, obtained by collusion or fraud, to be set aside, not from any regard to the parties concerned, but from motives of public policy.

In such a case, however, it should be made apparent that the party moving is acting from good motives, and not from any expected personal advantage. Where the judgment for divorce has been acquiesced in for the period of several years and the plaintiff has again been married, some better reason than the mere gratification of personal feeling on the part of the defendant, or the desire to obtain a further sum of money from the plaintiff, should be made clearly to appear, before the court would be warranted in granting such an application.

No ground of policy should suffice where the parties have acquiesced in the judgment for three years, and a third person has acquired rights, by marriage.

MOTION to set aside a judgment in an action for divorce, on the ground that the same was obtained by collusion.

INGRAHAM, J. The plaintiff and defendant were married in 1830. This action was commenced in 1859, for adultery, charged against the defendant. The defendant appeared and put in an answer, denying the adultery. The parties consented to a reference, and the referee reported in favor of

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the plaintiff. In January, 1860, a decree of divorce was granted. Since that time the plaintiff has again been married. The defendant now moves to set aside the judgment, and to be allowed to defend the action upon the ground that the same was obtained by collusion between herself and the plaintiff, with the consent of their attorneys; that such collusion consisted in an agreement that the defendant should make no defense except to serve the answer; that her attorney should make no cross-examination of the witnesses of the plaintiff, and would make no resistance to the rendition of the judgment against her.

It was intimated on the motion that the consideration of this agreement was the payment of a sum of money, but no such fact is stated in the affidavits; nor is there any proof before me of any payment whatever, except the usual payment of alimony during the action.

Independent of any other considerations, if the motion was properly made, and in due season, the court would order any judgment of divorce obtained by collusion or fraud to be set aside, not from any regard to the parties concerned, but from motives of public policy. In such a case, however, it should be made apparent, that the party so moving was acting from good motives, and not for any expected personal advantage. But where the judgment of divorce has been acquiesced in, for the period of several years, and the plaintiff has again been married, some better reason than the mere gratification of personal feeling, or the desire to obtain a further sum of money from the plaintiff, should be made clearly to appear, before the court would be warranted in granting such an application. As I have already said, the ground on which such an order could be made would be one of public policy, but no such reason should suffice where, after the acquiescence of both the parties in the judgment for three years, an innocent person has become involved by marriage, and the opening of the judgment would involve her in distress, and perhaps disgrace. This reason alone would be sufficient to justify me

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in denying the motion, if there were no other reasons for doing so, and leaving the parties to the consequences of their own acts and agreements, after the long delay that has taken place.

But upon the merits I do not think the collusion is made out in these papers sufficiently clear to set aside the divorce, even if there were no other objections thereto. The alleged collusion is said to consist in withdrawing any defense and omitting to cross-examine the plaintiff's witnesses or produce any witnesses for the defense. These matters are expressly denied by the plaintiff and by the attorney employed by the defendant in the action. The latter states that the reason why he did not cross-examine the witnesses was because he was informed by the defendant that the charge was true, and that all the compensation he received was from the alimony paid by the plaintiff. The plaintiff's attorney also swears that the reference was solely to avoid publicity; that the referee was not agreed on by the parties, but selected by the judge; and that there was no such agreement as set out by the defendant. This proof on the part of the plaintiff is from witnesses other than the parties, and, in the absence of any testimony on the part of the defendant except her own affidavit, is conclusive as to the weight of evidence being against the application.

I forbear to refer to the evidence in the case as to the original grounds on which the action was founded, both that taken before the referee and the new matter now stated, because the reasons above mentioned clearly require that the motion should not be granted.

The motion must be denied.

[NEW YORK SPECIAL TERM, November 11, 1863. *Ingraham*, Justice.]

PIERCE vs. HALL.

If all the steps are legally taken, in assessing taxes and returning them as unpaid, that are required, to give the comptroller power to advertise the land for sale, the omission of the town clerk, at town meeting, to give notice, according to the statute (1 R. S. 981, § 76, 5th ed.) that lists of the land advertised for sale by the comptroller, for unpaid taxes, have been deposited in his office, will not render all the other proceedings nugatory, and make void a title obtained under the sale.

One whose right to wild and uncultivated land purchased at a comptroller's sale for taxes, has become absolute; who is entitled to a deed from the comptroller; and who has all the actual possession that it is usual to take of that species of lands, may, *it seems*, maintain an action against a stranger for carrying away logs therefrom. He may at least, by virtue of such possession defend his title to the logs, or defeat an action brought against him by the trespasser, for their value.

The doctrine of *relation* being a fiction of law, is to be resorted to only for the advancement of justice; and has not been adopted as a rule when third persons who are not parties or privies might be prejudiced thereby. *Per* POTTER, J.

Whether a comptroller's deed of land sold for taxes, vests the title in the purchaser, by relation back to the time when the sale became absolute, so as to entitle him, as against a trespasser, to repossess himself of any property tortiously severed from the freehold? *Quære*.

THIS was an action to recover the value of 145 saw logs by count, making 45 standard logs, of the value of seventy cents each, brought originally in a justice's court. On the plea of title being interposed, the action was brought to this court, and tried at the Clinton county circuit, before Justice JAMES, without a jury. The plaintiff had these logs in his possession on lot No. 42, town of St. Armand, Essex county, on the 14th of March, 1861, and on that day the defendant forcibly took them away. The logs were cut, as found by the judge, from lot No. 23, old military tract. Sixty pieces, equal to nineteen standard, were cut and drawn before the 27th day of February, 1861, and the balance before the 14th of March, 1861.

Said lot No. 23 contained 160 acres. Forty acres in the northwest corner, in a square form, had been conveyed previous to 1852, and the plaintiff showed title to sixty acres in

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a square form around forty acres in the northwest corner, by comptroller's deed, dated February 7, 1855, in pursuance of a sale in 1852.

The defendant showed title by a comptroller's deed, bearing date February 27, 1861, in pursuance of a tax sale in 1853, which became absolute in November, 1855; of all of said lot No. 23, except forty acres in square form, in the northwest corner of said lot. That all the logs were cut south and east of 100 acres in square form, including the northwest corner, and not on the sixty acres covered by the plaintiff's deed. That no notice of the tax sale, under which the defendant claims, was given by the town clerk, as required by 1 *R. S.* 5th ed. p. 931, § 76; the annual town meeting being held in March. That the logs were not so intermingled by the plaintiff, as to prevent the sixty cut and drawn before the defendant's deed was executed from being distinguished from the others.

From these facts the judge found as conclusions of law as follows: 1st. That the comptroller's deed, under which the defendant claims title, was valid, and passed the title of lot No. 23, on which the logs were cut, to him. 2d. The comptroller's deed to the defendant vested the title in the defendant, by relation back to the time when the sale became absolute, so as to entitle him, as against a trespasser, to repossess himself of any property tortiously severed from the freehold. 3d. That the complaint be dismissed, and that the defendant have judgment for costs. From this judgment there was an appeal to this court.

G. M. Weed, for the appellant.

Beckwith & Johnson, for the respondent.

By the Court, POTTER, J. Assuming the facts as found by the judge at the circuit to be correct, and as I think the testimony justifies him in finding, the questions to be exam-

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ined are very much narrowed down, and the facts may be simply stated thus: 1st. The logs in question were cut upon that part of lot number 23, to which the plaintiff had *no* title, and he had *no* license from any one who had title thereto. 2d. The defendant obtained his deed from the comptroller on the 27th February, 1861, and sixty of the logs in question were cut before the date of that deed, and drawn off upon lot 42, and the remainder *after* the plaintiff's deed was delivered to him.

The first legal question that arises is, did the defendant show title to the lot on which these logs were cut? As against a wrongdoer, I think he did. The plaintiff did not even show a possession or a license to enter upon that part of the premises, except such as a trespasser takes, and the defendant's deed was good against that, for all the logs cut or drawn after its date, and had the plaintiff shown himself in a condition to question the defendant's right, as I think he did not, the only pretense of attack upon a title which the statute declares presumptively good is the omission of the town clerk, at town meeting in the year 1854, to give notice, according to the statute, (1 *R. S.* 5th ed. 931, § 76,) that lists of land advertised for sale by the comptroller, had been deposited in his office. This omission of the town clerk to perform a statute duty at town meeting, had there been one, (as it seems there was not that year,) can hardly be claimed to be a fundamental defect that would render void all other proceedings in the case. If, as we are bound to presume, all the steps were legally taken in assessing and returning the taxes as unpaid that are required to give the comptroller power to advertise, the omission of this *directory* duty of a subordinate officer would not render all other acts nugatory, and make void the title obtained under the sale. This point is not, therefore, well taken.

The tax sale, under which this deed of the defendant was given, was made in 1853, and the right under the sale became absolute, in November, 1855, at which time the purchaser or

his assignee was entitled to a deed;—the assignee to all the rights his assignor had. He omitted to take this deed until 27th February, 1861. The questions under this point are, 1st. Did the absolute right of the defendant to this property, and to the deed, give him such a title to it as to enable him to sue a stranger for injuries done to it? or, 2d. Did the deed executed to the defendant by the comptroller, in 1861, relate back to the time when his right became absolute, so as to enable him to maintain an action against a naked trespasser for injuries done prior to its date? In equity, the defendant by his contract with the state, having paid the full consideration, and received his certificate of right, and in all other respects having fully performed his contract as vendee, was, I think, entitled to the possession, and to the legal title. As was said in *Paine v. Meller*, (6 Ves. 353,) “the property was vendible as his, chargeable as his, capable of being encumbered as his, and devised as his.” And it may be added, would descend to his heirs if he died intestate; and it was wild and uncultivated land. He had all the actual possession that it is usual to take of that class of land; all that he would have, had the deed been executed in November, 1855; and it has been frequently held that the *title* to wild and uncultivated lands by construction draws to it the possession; and it was sufficient possession, I think, as against a stranger and trespasser, to have maintained an action for the logs removed therefrom; or, at all events it was sufficient to defend his title to the logs, or to defeat an action brought against him by the trespasser who had removed them, to recover for their value. In *Harker v. Birbeck*, (3 Burrow, 1563,) Ld. Mansfield held that when there was doubt about the right of possession, a writing relating to such right may be given in evidence, even though it creates only an *equitable* interest; and an *equitable title* could give possession. And in *Graham v. Peat*, (1 East, 246,) Lord Kenyon, Ch. J. said, “*any possession* is a legal possession against a wrongdoer;” even one less than sufficient to maintain ejectment. In *Gardner v.*

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Heartt, (2 Barb. 170,) the court said, "When the property is in the *actual* custody of no one, the constructive possession is in the general owner, and he may sue for an injury, as for an injury to his own actual possession against a person making no claim to title or possession." Had the defendant removed the logs from the *premises*, lot No. 23, the plaintiff would have failed to recover had he sued in such case, for a defect in proving his possession, or right of possession, or title to the premises, and property. He would only have proved himself a tortfeasor, which confers insufficient title to maintain an action, and I know no title that can be acquired to property by the tortious act of removing it from the true owner's possession, or against the owner's rights. The plaintiff failed in this case to show title in himself to the property in question.

2d. The doctrine of *relation* is claimed by the defendant to apply to his deed; that is, that the defendant's deed, when executed, related back to the time when the right to it was absolute; to wit, November, 1855, so as to give the defendant all legal rights to the estate as if executed in 1855. In judicial sales, as between parties and their privies, this is no doubt the rule, and so too when the deed is executed in pursuance of a previous contract; for the purpose of upholding an intermediate estate; and there are other cases, where the doctrine of relation applies; but the doctrine of relation being a fiction of law, is to be resorted to only for the advancement of justice; and has not been adopted as a rule where third persons who are not parties or privies might be prejudiced thereby. Besides, it is by statute (1 R. S. 5th ed. 934, § 99) declared that a conveyance by the comptroller shall vest in the grantee the absolute estate in fee simple. This means the legal estate; and from the date of this deed, the defendant's title is presumptively good against all the world, and can only be impeached for omission, to be shown, rendering it void, which has not been done in this case. If the grounds I have above taken are correct, it is not necessary to decide that

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the comptroller's deed relates back to the time when the right to it was absolute. I do not feel quite confident that the learned judge below was right upon that point. I am clear, however, that he was right in the result, and am for affirming the judgment, for the reasons herein given.

[SCHENECTADY GENERAL TERM, JANUARY 5, 1864. *Potter, Boekes and James, Justices.*]

RICE vs. BUCHANAN,

A venire should not be delivered to a constable, by a justice of the peace, until the parties have had an opportunity to make all reasonable objections to such officer.

Where a venire was issued by a justice on the demand of the defendant, out of court and in the absence of the plaintiff, and was delivered to a constable without the knowledge of the plaintiff, or any notice to him of the application therefor; *Held* that the justice was right in setting aside the venire, and the panel of jurors, returned by the constable, and in issuing a new venire.

A PPEAL from a judgment of a county court reversing the judgment of a justice of the peace.

By the Court, MASON, J. I am inclined to think the justice was right in this case in setting aside the first venire issued by him, although it had been served and a panel of jurors had been summoned and had appeared. That venire was issued by the justice on the demand of the defendant, out of court and in the absence of the plaintiff; and was delivered to the constable without the knowledge of the plaintiff, and before he had any notice of the application, and consequently without giving him any opportunity to object to the constable. The statute provides "that the justice issuing a venire shall deliver or cause the same to be delivered to some constable of the county, disinterested between the parties,

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and against whom no reasonable objection shall have been made by either party: (2 R. S. 243, § 97. 3 *id.* 441, § 88, 5th ed.) This statute would seem to imply that the venire should not be delivered to a constable by the justice until the parties have had an opportunity to make all reasonable objections to such officer. It requires the justice to deliver the venire, or cause it to be delivered, to a constable against whom neither party shall have made any reasonable objection. Now by issuing the venire in the absence of the plaintiff, and without any notice to him, as was done in this case, he is deprived of the right to raise his objections to the constable. I am aware that the statute declares the justice shall issue the venire upon the demand of the party, or that upon the demand of a trial by jury, the justice shall issue venire. (2 R. S. 242, § 94. 3 *id.* 441, § 84, 5th ed.) This does not mean that under all circumstances and without any qualifications he shall issue it; for if a party demands it before issue joined he certainly cannot have it. (3 R. S. 440, § 83, 5th ed.) And so he cannot demand it out of court, and in the absence of the other party, and without proper notice to him and on opportunity given to object to the constable. Such is the view taken of this statute by me in *Bennett and Ballou v. Porter*, in MS. some years since, and in which I then understood my brethren to concur, although I admit the case is not authority, as there are other questions in the case on which it may have been decided. It is no answer to this objection to say that the party can raise all reasonable objections to the constable by a challenge to the array of jurors. If the legislature has seen fit to give the party this additional security against an improper jury, it is the duty of our courts to protect him in that right. I know this challenge to the array opens a very broad field of objection to the constable. It is held to be a good cause of challenge to the array that there is consanguinity between the constable and the party, however remote; and so is affinity by marriage between the party and the constable's cousin, or the constable and the party's

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cousin ; or that the constable is liable to be distrained by the party, or is his servant or his attorney or counsellor, or acts as his advocate ; or if he be in anywise interested in the question to be tried, whether in the same cause or another cause depending on the same question ; or if he is godfather of the party's child, or the party to his child ; or there is a suit depending between him and the party which implies malice ; all these and many other grounds of objection to the constable are held to be good grounds of challenge to the array of jurors. (2 *Cowen's Treat.* 886, 2d ed.) And yet any one conversant with trials and the practice in these courts knows that one of the greatest evils existing in these courts is the shifts and resorts which are made by pettifoggers in procuring packed jurors to try the cause ; and as the legislature have seen fit to extend to the party the addition of the safeguard of objecting to a constable in advance and before the venire is put into his hands, we should not take it from him upon the ground that he can raise all good and reasonable objections to him by the challenge to the array. He may succeed in a preliminary objection informally made, which would not be a good ground of challenge to the array. There cannot be too many safeguards thrown around these jury trials in justices' courts, and the complaints which are so frequently made on this subject, of the evil practices which are often resorted to in obtaining jurors in these courts, should admonish the courts of review to see that all the safeguards which the law affords are preserved. I think, therefore, the justice was right in setting aside this venire, as the plaintiff not only challenged the array, but objected also on this ground. And this view of this statute was taken in *Mead v. Darrough*, (1 *Hilton*, 395,) where it was held to be error for one party to take a venire after the adjournment and before the day of trial, without giving notice to the other party, and thereby affording him opportunity to object to the constable whom it is proposed to have select and summon the jury. No inconvenience can result from this practice. If the party desires

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to have a jury trial he can call for the venire at the time of joining issue, and then the party will have an opportunity to object; or he can wait until the appearing on the adjourned day and then take out his venire. If he desires to take it out between the joining of the issue and the adjournment of the cause, he should be required to give the opposite party reasonable notice of the time when he will appear before the justice to have the venire issued. Although the venire is directed to any constable of the county, and although the statute says it may be given to any constable of the county, it is generally given to a constable of the town, and to the nearest one to the justice, unless some objection is made to him. Now the party who applies for the venire, in the absence of the other party, can raise his objections to one or more of the constables of the town, for the sake of getting the venire into the hands of one with whom he is on more particular terms of friendship; while the other party, not knowing that a venire has been called for, has no opportunity to object. He in fact knows nothing about it until he appears on the adjourned day to try his cause, and finds that a venire has been issued to a constable against whom he had objections, and that a jury has been summoned, obnoxious and dissatisfactory to him. He may challenge the array and fail to satisfy the justice that the wrong which he feels and knows has been done him, exists in the case, and he goes to trial under the impression that he need not expect fair and evenhanded justice from a jury thus obtained; and in many cases the result will realize his worst anticipations. This statute was passed in some measure to furnish a safeguard against these evils, and if one party can run to the justice out of court, and without any notice to the other take out his venire and get it into the hands of a particularly friendly constable, or which is the same thing, one unfriendly to his adversary, this statute becomes of no effect. The party who means to resort to these dishonorable practices will always obtain his venire out of court, and at a time when his adversary is not suspecting it.

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I am of the opinion, for the reasons above stated, that the justice was right in setting aside this panel of jurors for this cause alone, and in issuing a new venire for a new panel; that the county court erred in reversing his judgment; and that the judgment of the county court should be reversed and that of the justice affirmed, with costs.

[BROOME GENERAL TERM, January 26, 1864. *Campbell, Parker and Mason, Justices.*]

COOPER, receiver, &c. *vs.* SHAVER and others.

An assessment made by an insurance company upon its premium notes, which includes the amount of a previous assessment for losses that have been paid, is invalid and cannot be collected.

Premium notes, constituting the capital and being regarded as assets of a mutual insurance company, are ultimately liable for the payment of debts of all classes. It is therefore proper to assess them to pay losses on cash or stock policies issued by the same company.

Where it appeared that several years prior to the appointment of a receiver an insurance company had no funds to pay losses; and the order of reference directed the referee to ascertain the amount of debts &c., and to make an assessment to pay such debts; *Held* that it was a fair and legitimate inference that the cash premiums were exhausted, and that a necessity for resorting to the premium notes existed.

The provision contained in section 18 of chapter 486 of the laws of 1853, requiring notice of an assessment upon premium notes to be published for three weeks, by the secretary of the company, is merely directory, and the publication of such a notice is not a condition precedent to a recovery of an assessment by a receiver of the company.

After sequestration the corporate powers of an insurance company are suspended, and there is no such officer to perform that duty. Hence that provision cannot be literally carried out. *Per* MILLER, J.

Actual notice of the assessment is the main thing. And if demand of the amount be made, by the receiver, before the commencement of a suit therefor, this is sufficient.

After an insurance company is once established according to the provisions of the statute, upon proper evidence, its validity cannot be questioned, or its legal existence denied, by any of its members.

Persons who have given premium notes to a mutual insurance company, and have thus become members of the corporation, are not in a condition to assail the organization of the company.

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MOTION for a new trial, upon exceptions ordered to be heard in the first instance at the general term. The action was brought by the plaintiff, as receiver of the People's Insurance Company, to recover of the defendants the sum of \$227.80, being the amount of an assessment upon a premium note made by the defendants for the sum of \$800, on the 24th of March, 1853. The complaint alleged the incorporation of the People's Insurance Company, the making of the note, and the issuing of the policy to the defendants in the usual form. It then proceeds to state that a judgment was obtained against the company, an execution issued thereon and returned unsatisfied, and that proceedings were had by which the supreme court appointed a receiver of the stock, property &c. of the company. That afterwards, upon the petition of the receiver, setting forth among other things that there were claims in the sum of about \$25,000 due from the company to different persons, and praying for an order authorizing the receiver to make such assessments as might be necessary to pay the debts of such company, and to appoint a referee to ascertain the amount of the indebtedness and to assist the receiver in making the assessment, a referee was appointed, and an assessment was made upon the premium notes, and the referee reported to the court and found the amount of debts to be \$41,241.09. The report was concurred in by the receiver and confirmed by the court. The amount assessed against the defendants was demanded and they refused to pay it, and the plaintiff claimed to recover the same, with interest. The defendants interposed several defenses to the plaintiff's complaint, which it is not material to state particularly.

It appeared on the trial that the company was duly organized under the act of 1849; that it was unable to meet the losses it had sustained; that its effects were sequestered and went into the hands of the plaintiff as receiver. That an order of reference was made, to ascertain the amount of debts and make an assessment and report the same to the court.

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The referee ascertained and reported the debts and expenses and an assessment, which was duly confirmed by the court. The defendants were assessed \$227.80 on their note of \$800, which assessment was duly demanded and payment refused.

A number of questions were raised on the trial, which appear in the opinion. The cause was tried at the Ulster circuit, before Justice GOULD and a jury, in May, 1861, and a verdict rendered in favor of the plaintiff for the amount of the assessment and interest.

J. Grant, for the defendants, (appellants.)

E. Cooke, for the plaintiff, (respondent.)

By the Court, MILLER, J. The validity of the assessment is attacked on various grounds, which I shall proceed to consider, so far as it may be important in arriving at a proper disposition of the case. (1.) It is said that the losses are not alleged in the complaint, or proved; and that both of these are requisite to authorize a recovery. There was no objection made to the evidence introduced in regard to the losses, and even if the complaint was not strictly sufficient to admit of evidence upon that point, yet such testimony having been given, it must be considered as in the case. The complaint, however, does allege that the petition set forth the amount due from the company, and the referee reported the amount of debts due. As to the evidence on that subject, Hathaway, the referee who made the assessment, swears to the amount of the losses. He had ample opportunity to know, and it was his especial business and duty to ascertain the amount, and I think the losses are sufficiently established. (2.) That the assessment is for a much larger amount than the debts and liabilities of the company, and for a large amount of *debts already paid*. This objection embraces two propositions. First. That the assessment was for more than the debts. Second. That it embraced debts already paid. Hath-

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away, the referee, swears that the assessment was for judgments amounting to \$25,125.25, and losses not in judgment and expenses, \$15,968; thus making the whole amount of the assessment over \$41,000. Although he states that a portion, he thinks one third, of these losses for which the assessment was made had been paid before the assessment was made; yet I understand him to explain this in his last examination upon that point, by stating that many of the liabilities have been paid by borrowing money, which was to be repaid. If there was nothing more in his evidence, it would bear the interpretation that the moneys had been merely advanced, and so the witness testifies in a portion of his evidence. But the difficulty is, that he also says when first sworn, that some of the losses and expenses in this assessment were *paid from a previous assessment*. And when afterwards recalled, he testifies expressly that *the assessment in question included losses that had been paid by a previous assessment*. Without reference to the other testimony as to the amount of losses, it would appear that the assessment in question embraced losses which had before then been paid. The point was distinctly taken on the motion for a nonsuit, and the defendants' counsel requested the court to submit the cause to the jury upon the question as to whether other amounts than the debts, liabilities and expenses of the company, were included in the assessment, and upon the question whether there were losses, liabilities and expenses of the company equal to the amount of the assessment.

If the assessment included the amount of previous assessments for losses which had been paid, then it was invalid, and the plaintiff could not recover. (*Herkimer Ins. Co. v. Fuller*, 14 Barb. 373. *Shaughnessy v. The Rensselaer Co. Ins. Co.*, 21 id. 605. *Bangs v. Gray*, 2 Kernan, 477.)

I have examined with some care, for the purpose of ascertaining whether this difficulty could not be obviated; but it strikes me that it was an insuperable barrier to a recovery on

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the trial, and the judge at least should have submitted the case to the jury upon the question.

If the views I have expressed on this point are correct, a new trial must be had by reason of the error of the judge in this particular; but as the same questions now presented may again arise, I will proceed to examine the other objections to the assessment, and some of the other questions raised.

(3.) It is objected further to the assessment, that a large amount of the losses included and made a part of the assessment had been paid by the company, both from cash premiums received by the company, and by a previous assessment. What has already been said as to the first and second objections covers this proposition, and the same remarks will apply.

(4.) That by the terms of the note it can only be assessed in the department to which it belonged, which was that of *special hazards*. The thirteenth section of the charter of the company makes provision for the division of the company and its business into departments or classes, and provides "that the premium notes in one class shall not be assessed for the payment of any losses except in the class to which they belong." In *Thomas v. Achilles*, (16 Barb. 491,) it was held that this provision was in contravention of the general act, under which the company was formed, and should be disregarded in making an assessment. A contrary doctrine, however, was held in *White v. Coventry*, (29 Barb. 305, *Sheldon v. Roseboom*, Id. 309, note, *Paige, J.*) and the authorities are conflicting. It is not material, as I consider, in this case, to examine and determine which of these decisions is correct. The notes constitute the capital, and are regarded as assets of the company. (*Laws of 1853*, p. 412, § 17.) They were therefore ultimately liable for the payment of debts of all classes, and it was proper to assess the premium notes to pay losses on cash or stock risks. (*Mygatt v. N. Y. Protection Ins. Co.*, 21 N. Y. Rep. 52. *White v. Havens*, Court of Appeals, 20 How. Pr. Rep. 177.) The cash being ex-

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hausted, the premium notes must bear the burden. (*Laws of 1853, p. 909, § 13.*) I think in the absence of proof it may fairly be inferred that the cash premiums had been exhausted. One of the witnesses swears that as far back as 1853, there were no funds to pay losses. The order of reference directed the referee to ascertain the amount of debts, &c. and to make an assessment to pay these debts. From the order and the facts disclosed it is a fair and legitimate inference that the cash premiums were exhausted, and that a necessity existed to resort to the premium notes.

The foregoing observations dispose of all the objections made to the validity of the assessment, and I shall proceed to examine such other points presented and urged as grounds of error by the defendants' counsel, as may be regarded as material.

It is said that there was no notice of the assessment published for three weeks, as required by section eleven of the by-laws of the company, and by section 13 of chapter 466 of the laws of 1853. The notice referred to is required to be published by the secretary. After sequestration the corporate powers of the company are suspended, and there is no such officer to perform this duty. Hence this provision cannot be literally carried out. When the company goes into liquidation the notes must be applied to the payment of the debts, and it only remains to enforce their payment according to their conditions, so far as is practicable in the altered aspect of affairs. Actual notice of the assessment is the main thing, before bringing a suit; and as the statute does not require the receiver to publish a notice, it cannot be indispensable to a recovery. The object, doubtless, was to give information to the persons assessed of the assessment. The provision, at most, is directory, and I do not understand that it is a condition precedent to a recovery by a receiver, of an assessment. The statute (*Laws of 1853, p. 910, § 13*) provides as a penalty for a refusal to pay within the thirty days, that the directors may sue for and recover the whole amount of the

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note, with costs. In the case at bar a demand was made, which I think was sufficient, before the commencement of the suit.

It is further objected that the Delamater judgment was void, by reason of there being no proof that the person to whom the summons was delivered was a managing agent of the company, and that the court erred in allowing an amendment. I do not think that the alleged defect was a jurisdictional one, so as to affect the validity of the judgment. It was, at most, an irregularity, which could be amended at any time, *nunc pro tunc*. (*Farmers' Loan and Trust Co. v. Dickson*, 17 How. Pr. Rep. 478. *Wight v. Alden*, 3 id. 213.)

I think there was no question of fraud to submit to the jury in the case; nor any question as to the insolvency of the company. The representations made by the agent were mainly in reference to the solvency of the company; that it was a sound, solvent and reliable institution; and that its capital was \$100,000. I discover no evidence to show that they were incorrect or untrue; certainly none that the officers of the company at the time knew that it was insolvent.

There was sufficient evidence to show the loss of the note, and parol proof of its contents was properly received. It may be proper to observe that the referee's report was not admitted by the court to prove losses, but it was received to show the assessment. Nor was any claim made by the defendants, upon the trial, that they were entitled to a verdict for the counter-claim set forth in the answer. The attention of the court and the opposite counsel was not directed to any such defense. Perhaps if it had been, it might have been waived or obviated in some manner.

The several offers to prove that the company had not at any time capital to the amount of \$100,000, and that the company surrendered to the makers, and the makers drew out, a large portion of the stock notes on which the company was formed, without any payment, related to the organization of the company, and affected the existence of the corporation.

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It cannot be thus impeached. After it is once established according to the provisions of the statute, upon proper evidence, its validity cannot be questioned, or its legal existence denied by any of its members. (*Laws of 1849, p. 446, § 11.*) The corporation is responsible to the government, and until forfeiture may continue to exercise its legitimate functions. (*Hurlburt v. Carter, 21 Barb. 224.*) It cannot be attacked collaterally, and judicial proceedings must be resorted to and judgment of ouster had, to effect a dissolution. (*People v. The President, &c. of Manhattan Co., 9 Wend. 351. Angell & Ames on Corporations, § 777.*) Added to this the defendants were members of the corporation. (*Laws of 1853, p. 909, § 13.*) And as such not in a condition to assail an organization which had existed for a number of years. The defendants could not thus be discharged from their liability and the persons insured deprived of the very means intended and provided, for the payment of accruing losses. I think, therefore, that the evidence was improper.

I have discussed the most material questions raised by the defendants' counsel upon the trial, and examined with some care the other points presented. I am satisfied that no error was committed by the judge in his decisions, with the single exception to which I have before referred, and for that error a new trial must be granted, with costs to abide the event.

[ALBANY GENERAL TERM, December 1, 1862. *Hogebom, Peckham and Miller, Justices.*]

CHRYSLAR vs. WESTFALL.

The provision of the statute (1 R. S. 853, § 80) directing that owners of adjoining lands shall each make and maintain a just proportion of the division fence between them, unless one of them shall choose to let his land lie open, was intended to apply to cases where lands have been partially fenced, as well as to those in which the owner chooses to let his land lie altogether in commons.

The language of the statute includes any case where the owner does not choose to enclose his land entirely.

APPEAL from a judgment of the Schenectady county court, reversing a judgment in favor of the plaintiff, rendered by a justice of the peace, on the verdict of a jury. In the justice's court Chrysler sued Westfall to recover the value of that part of a division fence which it is claimed he was bound to build, and refused after notice to build, and which was then built by the plaintiff. The defendant insisted that he was not liable to pay for the fence, because he chose to let his land adjoining that of the defendant lie open. The cause was tried before a jury, and on the trial it appeared that the plaintiff and defendant joined land for a distance of between two and three hundred yards. The land of the defendant is wood-land, twenty-five acres, which has never been enclosed by itself, and which was used only for timber and fuel. A portion of the farm of the defendant lies upon a road, and the wood lot is partially enclosed by fences. The land cleared is fenced, and in respect to the wood land owned by the defendant and adjoining the plaintiff on the south, there is a fence on the north separating it from a cleared field, and on the east, separating it from land of R. Kelley, and partially on the west, separating it from the cleared land of N. B. Dunham. In April, 1860, the plaintiff gave the defendant notice to select a fence viewer and have the fence divided. The fence viewers met, and made a certificate of division, which was filed in the town clerk's office. This paper was offered by the plaintiff as evidence, on the trial, and objected to by the defendant, and rejected by the justice. The plain-

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tiff gave the defendant notice to build his part of the fence. The defendant declined to do so, on the ground that he chose to let his land lie open. The plaintiff then built the whole of the fence. It was shown on the trial that the fence built by the plaintiff on the west half of the division line was worth \$23 or \$24. The recovery was for \$23. There was some evidence in the case, tending to show that the defendant assented to the erection of the fence by the plaintiff, and promised to pay for it. The substance of the evidence on this subject was that the plaintiff called to see the defendant about the fence, and said to him "I suppose you don't want my cattle in your woods." The defendant answered "No; I don't want them there." The plaintiff said "You don't want me to take up the fence again, do you?" The defendant said he did not. The defendant said, "There wants to be a fence there." He also said he did not want any trouble or law about the fence, but would pay the plaintiff for it if he was obliged to.

There was a motion to nonsuit the plaintiff, but no grounds were stated. The case was submitted to the jury without objection, and they found a verdict for the plaintiff, upon which the justice gave judgment.

J. H. Reynolds, for the appellant, (plaintiff.)

S. W. Jackson, for the respondent, (defendant.)

By the Court, MILLER, J. Two questions arise in this case. First. Whether upon a fair construction of 1 R. S. 353, § 30, the defendant was bound to maintain a proportion of the fence erected by the plaintiff, and was liable to him for the expense of erecting it. Second. Whether, if not liable under the statute, there was any evidence upon the trial tending to show that the defendant had assented to the erection of the fence, or promised to pay the plaintiff for it after it was erected by him.

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I. I incline to the opinion that the statute referred to was intended to apply to cases where lands have been partially fenced as well as those in which the owner chooses to let his land lie altogether *in commons*. The language of the statute is quite broad and comprehensive, and the words "*shall choose to let such land lie open*," includes any case where the owner does not choose to enclose his land entirely. Whatever, therefore, may have been the general object of the statute in reference to compelling owners of cattle to keep their cattle upon their own premises, and requiring them to share equally in the burthen of keeping and maintaining division fences, it has made an exception in favor of those who choose to let their land lie open; and it by no means destroys its force because perhaps a case may occasionally arise where the owner of adjoining land who desires to avail himself of that exception finds his land fully enclosed by reason of the action of adjoining owners in fencing their land. I think, therefore, upon a fair construction of the statute, the defendant was under no obligation to maintain a proportion of the division fence in question. The conclusion to which I have arrived, as to the meaning of the statute, renders it unnecessary to examine whether the action can be maintained without a division of the fence being made by the fence viewers, according to the provisions of 1 R. S. 353 and 354.

II. The solution of the second question depends entirely upon the fact whether there was any evidence to sustain the verdict upon the theory that the defendant admitted his liability and that the fence was made for his benefit. The evidence was hardly sufficient to establish a liability. The remarks of the defendant were mainly in answer to interrogatories put to him by the plaintiff, and were expressly qualified by an avowal that he would pay if obliged to do so. This cannot be regarded as assenting to the erection of the fence, so as to make him liable for the expense. Even if it may be inferred that the defendant was willing that the plaintiff should fence the land at his own expense, it is very

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evident that he did not intend to incur any liability. There was no promise to pay; no acknowledgment of liability; no such approbation of the act of the plaintiff from which a promise might be implied. On the contrary, the defendant expressly denied his obligation to pay for the fence. His language was equivalent to saying, I am not bound, and refuse to pay for what you have done gratuitously and without my request, knowledge or consent. I think there was no evidence from which a jury were authorized to find an acknowledgment of liability or a promise to pay the plaintiff for making the fence. With the view I have taken, the question whether the verdict was for more than the defendant's proportion of the fence is unimportant.

The judgment of the county court should be affirmed.

[ALBANY GENERAL TERM, December 1, 1862. *Hogeborn, Peckham and Miller, Justices.*]

STOVER and FISH, surviving administrators, &c. vs. FLACK.

Where A., in pursuance of a parol authority from B. purchases stock in his own name, on the joint account of himself and B., the latter becomes the owner of one half of the stock, and liable to pay A. the amount advanced therefor.

No written assignment of the stock from A. to B. is necessary to render B. liable for his proportionate share of the purchase money.

Where A. buys and pays for stock at B.'s request, on joint account, under an agreement that B. shall pay him for the moneys advanced, A. holding the stock, in the mean time as a pledge for repayment, with a right to expose it for sale in the market, if upon notice B. refuses to pay for it, A. is not bound to sell the stock in market, if it be worthless, before commencing a suit against B. to recover the amount advanced on the purchase.

Such an agreement, though by parol, is not void by the statute of frauds.

Where one partner subscribes for stock for the benefit of both, signing his name individually, and not as trustee, he is not a trustee, within the provisions of the general act of 1848, relative to the formation of corporations, &c. (*Laws of 1848, ch. 40, §§ 16, 24.*)

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THIS action it prosecuted by the plaintiffs, as surviving administrators of Peter Stover, deceased, to recover one-half of a subscription of \$1000, made by the said Peter Stover to the capital stock of the Diamond Mills Manufacturing Company, in the month of May or June, 1852, and the further sum of \$500, paid by the plaintiffs to discharge the debts of said company, under the statute making the stockholders liable for the debts of said company, on the 28th of February, 1859. The plaintiffs claim that said subscription was made for the joint benefit of the said Peter Stover and the defendant, by the authority of the defendant, and paid for on their joint account; that it was so purchased and paid for; that the defendant adopted the act, claimed to own half the stock, and received half the dividends; that he waived the formality of a subsequent writing which was contemplated by both, declaring the rights and interests of the parties. That Stover was to pay for the stock and hold the same for the joint benefit of both parties, and that the defendant was to become liable to said Stover for one-half of the amount advanced by him to pay for said stock. The defendant claimed that it was agreed between himself and Stover, that the latter was to take \$1000 of the stock in question and pay for the same. That he, the defendant, was to pay to said Stover the interest upon one-half of the sum paid, and to receive one-half of the dividends to be declared thereon. That Stover, after notice to the defendant, might sell the said one-half of the stock in market to reimburse himself, and that in case it sold for less than par, the defendant was to pay him the deficiency, and if the same sold for more than par, the defendant was to have the surplus. That this arrangement was verbal, and the parties were to meet subsequently and reduce the same to writing and execute it, which was never done; and that Stover, although applied to by the defendant to execute the written agreement, refused to do so. The action was commenced March 22, 1859. The case was tried at a circuit court, held in Rensselaer county in June,

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1861, before Justice PECKHAM and a jury. On the trial the plaintiff proved that the said Peter Stover subscribed and took \$1000 of the stock of the Diamond Mills Manufacturing Company, organized under the general act of 1848. That the same was paid for by his estate. That the said company became insolvent. That on the 29th of September, 1858, judgment in favor of Deborah Powers, against the company, for \$7992.57, was recovered, and execution issued thereon, and returned unsatisfied. That a circular was issued by the officers of the company to stockholders, showing the company to be insolvent upwards of \$20,000, and that all its estate, real and personal, had been sold, and requiring each stockholder to pay upon the outstanding debts of the company, a sum equal to the amount of their respective subscriptions. That the plaintiffs, as the personal representatives of the said Peter Stover, on receiving said circular, and in obedience to its requirements, paid the further sum of \$1000 towards discharging the debts of the said company, which said last mentioned sum was paid February 28, 1859. William Bradshaw, a witness for the plaintiff, testified as follows : "I was a member, a trustee, and the treasurer of the Diamond Mills Manufacturing Company ; I know Peter Stover ; this company bought flax of Stover and allowed him for the same upon his stock ; on the 23d of March, 1853, I settled with his administratrix, &c., and at that time we had received \$1272.82 in flax, and paid them the balance ; I was present with the said Peter Stover and the defendant when they were talking about taking some stock in this company ; the conversation was that Stover was to subscribe \$1000, pay for it, and the defendant was to have one-half of it ; the defendant to pay interest on the advance and receive one-half of the dividends on the stock ; *the agreement was to be thereafter reduced to writing and signed by the parties ;* it was further understood that if Stover desired to realize the money advanced, he might go into the market and sell the stock, after giving the defendant notice thereof ; the defendant then to

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have the right to pay the money advanced and take the stock, and if the stock was sold at less than par, the defendant was to pay the deficiency, and if it sold for more than par he was to have the surplus; this conversation *was in May or June, 1852*; Stover died eight or nine months thereafter." "It was agreed between them that Stover was to subscribe \$1000 and hold it, the defendant to pay interest on \$500, and receive the dividends on \$500; Stover to have the privilege of putting \$500 of the stock into market after giving the defendant notice thereof, with the privilege of paying therefor at par and taking the stock; that if the defendant did not take the same and it was so sold in market, the defendant was to pay to said Stover any deficiency between the price it sold for and the par value thereof, and was to have any excess realized on such sale beyond the par value thereof. *It was understood and agreed that they were thereafter to meet and have the agreement reduced to writing and signed by the parties.* There was nothing said about the defendant's being the owner of one-half of the stock except what was to be inferred from what I have stated on my cross-examination." "The defendant was to own one-half of the stock on the terms I have stated. It was mentioned that if Stover wanted the money he was to call on the defendant for it, and the defendant was to take the stock and pay the money; if the defendant did not pay it, Stover was to sell the stock—or he might sell it—can't say which. I was the treasurer of the company. There never was any certificate filed in the county clerk's office that the stock had been subscribed and paid for." "My present impression is that the stock was to be sold upon defendant's default to pay for it." Thomas Newcomb, a witness for the plaintiff, testified as follows: "I reside in Albany; know the defendant. I subscribed for twenty shares of the Diamond Mills Manufacturing Company's stock; my subscription was the last one made. I had a conversation with the defendant with reference to his interest when I signed; he said he had taken \$500 worth through Peter Stover; *that*

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Stover had subscribed for him and himself. I conversed with him several times after. Mr. Flack told me he had received a dividend on his stock while the company was in operation; *he told me he had received one pound of thread on his stock*; I got four pounds of thread on mine; *got it at the defendant's store.* They told me at the mill that the thread dividend was made, and that my thread was at the defendant's store, and I called there and got it." "He said he was to pay Stover for the use of the money and have the dividends. Said he expected to make something, or he would not have taken it. I am not sure that I remember all that was said. *He told me in his store that he had received the pound of thread.* I don't recollect the precise language. I asked him if there was any thread from the company there for me. He said there was four pounds. He said he got one pound and I got four pounds; that was pretty much all that was said." Albert E. Powers, a witness for the plaintiffs, testified as follows: "I was treasurer of this company when the stock was paid upon our certificate for the full amount of the stock; afterwards, and *on the 16th of March, 1859,* the original certificate was surrendered and canceled, and two new ones of \$500 each, *paid* in its stead; one being issued to Lois Stover, administratrix, and the other to David H. Flack, the defendant. This was done at Mrs. Stover's request; I delivered them to her."

On the 16th of March, 1859, the plaintiffs tendered to the defendant his certificate of stock, with an assignment thereof to him from Lois Stover, the administratrix, and demanded payment of \$500 and the interest; which was refused.

John G. McMurray was one of those whom the defendant solicited to become stockholders. He told Mr. McMurray, in or about 1855, *some three years after the death of the intestate,* that "*he and Stover had taken \$1000 of its stock in Stover's name.*" David Judson testified that "a short time previous to Stover's death," the defendant told him "he had an opportunity of selling this stock to Mr. Ransom, and

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that the reason he did not was that he had not got it. He said he had seen Stover about it, and that he put him off so that he could not get it.

The jury found a verdict in favor of the plaintiff, for \$1374.32, and from the judgment entered thereon, and the order of the judge, denying a motion for a new trial, the defendant appealed.

W. A. Beach, for the appellant.

J. K. Porter, for the respondent.

By the Court, MILLER, J. Several important questions were raised by the defendant's counsel upon the argument of this cause, which I will proceed to consider.

I. It is urged that the agreement between the defendant and the intestate was not a legal and valid contract by which the defendant became the owner of one-half of the stock subscribed for, or liable to pay the moneys advanced for the same. The authority of the intestate to purchase the stock in his own name, on the joint account of himself and the defendant, I think was sufficiently established by parol, and a written instrument executed by the defendant was not necessary for that purpose. The intestate was acting for the benefit of both parties, and he was agent for the defendant in the purchase. In *Burr v. Wilcox*, (22 N. Y. Rep. 551,) it was held that one for whom stock had been purchased by an agent is a stockholder, although the stock has been apportioned to the agent, for the principal. (See also *McWhorter v. McMahon*, 10 Paige, 386; *Lawrence v. Taylor*, 5 Hill, 107.) The purchase of the stock having been made by due authority, for the joint benefit of the parties, although in the name of the intestate, the defendant was in fact the owner of one-half of it. The act of one of the parties being the act of both, no written assignment of the stock was necessary to make the defendant liable. It was not a mere beneficial interest to be

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enjoyed at his pleasure or volition, but an obligation which he, through his agent, and as a joint owner, had assumed, and which made him liable to his copartner in the transaction, for his proportionate share. (*Bank of Rochester v. Monteath*, 1 *Denio*, 402. *Wright v. Hooker*, 6 *Seld.* 51.) The defendant never demanded a transfer of the stock, and although an assignment was actually tendered to him before suit brought, he declined to accept it. He certainly has no reason to complain if his own act has prevented an assignment.

II. It is said that the defendant was not liable to pay for the stock except upon a sale of it in market, upon notice. There is no such stipulation in the contract; nor do I find any thing to warrant that interpretation of it. I have already discussed the question as to how far the defendant was the owner of the stock under the agreement, and it is unnecessary to enlarge upon that subject. It is however proper to observe in this connection, that there is a wide and manifest distinction between a contract where the right to sell stock is reserved for the benefit of the pledgee, and one where a sale of property is made containing a covenant that the vendor shall do certain acts which will materially enhance the value of property sold, and the failure to perform which must necessarily produce great loss and injury. In the latter case the party injured may very properly avail himself of a failure to perform when prosecuted for the consideration money. In the former I do not discover any good ground upon which the reservation of a right to sell can be considered as a condition precedent. The reservation was made for the benefit of the intestate, to secure him for the moneys advanced, and not as a condition of the defendant's liability. It was but a cumulative remedy, without impairing any other rights. (*Troy Turnpike Co. v. McChesney*, 21 *Wend.* 296. *Ogdensburgh R. R. Co. v. Frost*, 21 *Barb.* 541. *Northern R. R. Co. v. Miller*, 10 *id.* 271. *Troy and Boston R. R. Co. v. Tibbits*, 18 *id.* 297.) In case the intestate did sell, the defendant was liable to pay whatever loss was sustained. Even if it did not

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by the terms of the agreement rest with the intestate to determine whether he should sell or not, there was no request made by the defendant to sell, and I do not see that the defendant was injured in the least by not exposing the stock for sale, as there is no evidence that the stock could have been sold so as to benefit him. But, independent of this view of the matter, the charge of the judge to the jury that Stover was not bound to sell the stock in market before commencing a suit, if it was worthless, virtually left it for them to determine whether the defendant had lost any thing in consequence of a failure to sell the stock; and as they have found against him on that point there is no ground for complaint.

III. If any question can arise as to an *implied promise* where the doctrine of principal and agent, and of liability arising from the action of one of two joint parties is applicable, perhaps a promise to pay may be implied from the facts presented in this case. I deem it however unnecessary to discuss that question, as it appears that the promise was express and absolute, in the contract. The intestate bought and paid for the stock at the defendant's request, under an express agreement that the defendant was to pay him for the moneys advanced, the intestate holding the stock in the mean time for the defendant as a pledge for repayment, with a right to expose it for sale in the market, if upon notice the defendant refused to pay for it. Here was an absolute agreement to pay the money, which was ratified by the subsequent acts and conduct of the parties.

IV. I do not regard the agreement as inchoate and imperfect because the parol negotiation was not reduced to writing and signed by the parties, as was originally intended. The stipulation that the contract should be written was not an essential element of vitality. It was not the writing which would render it effective. This was only the means provided for making the agreement more definite and certain. If the parties chose to do so, and actually did execute the contract without a writing, they had a perfect right thus to dispense

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with it and waive it, although such a condition might be enforced in equity upon a refusal of either party to execute a written contract. A party may waive a condition precedent to an agreement by entering upon its performance. (*Betts v. Perine*, 14 *Wend.* 219. *Grote v. Grote*, 10 *John.* 402.) Some of the evidence in this case shows that the defendant claimed the benefit of the parol agreement and to own the stock after the intestate had declined to sign the writing, and I think the judge properly submitted to the jury the question of fact which arose upon the testimony whether the understanding or agreement that the contract should be reduced to writing was waived by the defendant.

V. The point now urged, that conceding a perfect agreement, it was broken by Stover so as to discharge the defendant, does not appear to have been distinctly taken on the trial at the circuit, and cannot be made available now.

VI. I think the contract was not void by the statute of frauds, because (1.) It was partially executed and carried into effect. (2.) There was no sale of the stock by the intestate to the defendant. The purchase of the stock was made in the name of the intestate by both parties and for their joint benefit, by the authority of the defendant. It appears to me, therefore, that no question arises under this statute.

VII. The action was not barred by the statute of limitations. (1.) The intestate paid the money for the stock, on the 23d of March, 1853, within six years before the commencement of the suit. The defendant could not be liable to pay prior to the advance of the money, and the statute would not commence running before the payment. (2.) The amount of personal liability incurred by reason of holding the stock was not paid until the 28th of February, 1859. (3.) It may perhaps be questionable whether the statute began to run before a demand or before a settlement and a balance struck between them as joint owners of the stock.

VIII. The offer made by the defendant's counsel, to prove that Stover did not at any time during his lifetime make an

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offer to or a demand of the defendant with reference to the stock was properly rejected by the justice. In the absence of any evidence to show that he did make such offer or demand the law presumes that he did not. The defendant had the benefit of this legal presumption, and his case would not have been strengthened by any negative evidence.

IX. It is insisted that the judgment was erroneous to the extent of five hundred dollars paid upon the debts of the company in February, 1859, with interest from that date. (1.) I am inclined to think that Stover was not a trustee, within the provisions of the general act of 1848. (*Laws of 1848, ch. 40, §§ 16, 24.*) (2.) Stover had signed individually and not as trustee, and could not avail himself of a fact not known at the time of his subscription, as a defense. (3.) Stover and the defendant were joint partners in the subscription, and when one partner buys for both it is not a trust. In 22 *N. Y. Rep.* 552, 553, it was held that the relation between the parties in a similar case was not that of a trustee and *cestuis que trust*, but that of principal and agent. (4.) But no such point was made in the court below, and it is too late to present it now.

In conclusion, upon the facts of the case the jury have found in favor of the plaintiff, and there is no such preponderance of evidence upon the main issues as would authorize this court to set aside their verdict upon that account.

A new trial is denied, and the judgment affirmed with costs.

[ALBANY GENERAL TERM, December 1, 1862. *Hogeborn, Peckham and Miller, Justices.*]

YATES vs. ALDEN.

A plaintiff alleged, in his complaint, that being the owner of a farm, he, on the 28th of April, 1858, conveyed the same to the defendant for the price or sum of \$11,000 which was paid in ninety shares of stock (of \$100 each) in the La C. and M. Rail Road Co. That the defendant falsely and fraudulently represented to the plaintiff that such stock was legally issued to the defendant and his partner, C., upon subscriptions fully paid, which representations were false and made fraudulently, with knowledge that they were false, and were made for the purpose of obtaining a conveyance of the land. The plaintiff then alleged that such stock was worthless and invalid, and was known by the defendant to have been issued at fifty cents on a dollar, in violation of the charter of the company, but that he fraudulently concealed that fact from the plaintiff. The plaintiff further alleged that the defendant, for the purpose of fraudulently inducing the plaintiff to exchange his farm for said stock, falsely represented that the said corporation was in a sound, solvent and prosperous condition, and was able to pay from its income large dividends, which representations the defendant, being its general fiscal agent, knew to be false; and that relying upon the truth of such representations, and the validity of the certificate of stock, the plaintiff executed the deed, and was thereby defrauded.

Held, 1. That if there was any material variance between the pleadings and the proofs the court should have allowed an amendment of the complaint in conformity with the facts proved.

2. That although it was averred in the complaint that the plaintiff relied upon the fraudulent representations, as to the condition of the company, and that the certificate was valid, it was not essential that both those allegations should be proved to be false. That if it appeared satisfactorily that the former were false and made for the purpose of inducing the plaintiff to make the exchange, this would be sufficient to establish the cause of action, and that the latter averment might be rejected as surplusage.

3. That assuming that the pleadings were sufficient, or might have been amended, the judge at the trial erred in granting a motion for a nonsuit and in refusing to submit to the jury the question of fraudulent representations as to the soundness and solvency of the company.

4. That all matters bearing upon the question of fraudulent representations, or going to show that the statements of the defendant as to the condition of the company, and the value of its stock, were false, to his knowledge, were proper subjects for the consideration of the jury, to whom they should have been submitted by the judge.

5. That it was also a question for the jury whether the plaintiff, although he had some general knowledge of the character and responsibility of the corporation, was governed by the representations of the defendant, who was its financial agent and had been connected with its management, and had an intimate knowledge of its affairs.

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6. That whether representations made by the defendant on the same day and only a short time before the agreement was executed, were designed to influence and did influence the plaintiff; and whether they were made in reference to the contract; were also questions which properly belonged to the jury to decide.

MOTION for a new trial upon exceptions ordered to be heard in the first instance at general term. The plaintiff, in his complaint, alleges that he was the owner of a farm of land in the city of Albany, containing forty-seven acres, which he conveyed to the defendant on the 28th of April, 1858, subject to a mortgage of \$4000. That the consideration agreed in the deed was \$11,000, which was paid in exchange by ninety shares of stock of \$100 each, purporting to be full paid stock issued by the La Crosse and Milwaukee Rail Road Company to the defendant and one Chamberlain, his partner. That the defendant falsely and fraudulently, and with the intent to defraud the plaintiff, represented to him that the said ninety shares of stock were legally issued, and a valid stock issued upon subscriptions, full paid to said corporation; which representations were false, and made fraudulently with knowledge that they were false, and made for the purpose of fraudulently obtaining said conveyance, to the plaintiff, who was ignorant of the falsity and fraudulent character and invalidity of the said stock, but that relying upon said representations, he did execute and deliver the said deed to the defendant, in exchange for the said stock, which was worthless and invalid, as to the plaintiff was unknown, but which was known to the defendant to be issued at fifty cents on the dollar, in violation of the charter of the company; all of which matters the defendant fraudulently concealed from the plaintiff, and by means of which he was defrauded of his farm.

The plaintiff also further complained, that the defendant, in order and for the purpose of fraudulently inducing the plaintiff to make the exchange of said land, for said certificate of stock, falsely and fraudulently misrepresented to the plain-

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tiff that the said corporation was in a sound, solvent and prosperous condition, and was in the receipt of a large income, and was able to pay from its income large dividends; which representations the defendant, being its general and fiscal agent in New York, knew to be substantially false, but of which fraud, &c. the plaintiff was ignorant; but that relying upon such representations being true and that said certificate was valid, he did execute the said deed and was thereby defrauded.

The plaintiff also alleged that he tendered the certificate of stock received by him on the transfer of the same to the defendant, and now holds it subject to his order. The plaintiff demands judgment for \$11,000, and interest.

The defendant's answer admits the exchange of the stock for the land; alleges that the plaintiff was the owner of stock of the company and knew its value, and that it had a known market value, and it was sold in reference to that value; and that within a year after the sale, the plaintiff could have sold it for ninety cents on a dollar. The defendant also alleges that the road was not then completed, and its ultimate success was then a matter of opinion.

The action was tried at the Albany circuit, in September, 1861. The contract was in writing, and executed on the 12th day of April, 1856. The case shows that in April, 1856, the plaintiff exchanged with the defendant a farm of land of some forty acres, located in the tenth ward of the city of Albany, for ninety shares of \$100 each, of the capital stock of the La Crosse and Milwaukee Rail Road Company. The same was subject to a mortgage of \$4000, which the defendant assumed to pay. The defendant received the certificate for ninety shares to Chamberlain & Alden, on the 28th of April, 1856, and on the next day went to the transfer office of the company in the city of New York, and took a new one in his own name.

The evidence on the trial, so far as it is material to the questions discussed, is referred to in the opinion of the court.

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The plaintiff having rested, the defendant moved for a nonsuit, on the ground that a cause of action was not proved. The plaintiff's counsel objected to the nonsuit, and insisted on having the case submitted to the jury generally on the pleadings, and on all the facts proved in the case, and especially insisted, 1st. That the certificate of stock delivered by the defendant to the plaintiff was invalid, having been illegally issued by the company at fifty cents on the dollar, which was concealed by the defendant from the plaintiff. 2d. That the question of fraudulent representations should be submitted to the jury, and that if there was any allegation of variance between the pleadings and proofs the defendant should show that he was misled by such variance, to the satisfaction of the court. The court held and decided that the proof was insufficient to establish a cause of action against the defendant, and granted the motion for a nonsuit, refusing to submit the question of fraudulent representations to the jury. The plaintiff's counsel duly excepted to the decision of the court in favor of the motion for a nonsuit, and in refusing to submit the case to the jury. The court thereupon decided to nonsuit the plaintiff, to which decision the plaintiff's counsel excepted. The court ordered that the case, with the exceptions, should be heard in the first instance at the general term, proceedings in the mean time to be stayed.

L. Tremain, for the plaintiff.

C. B. Cochran, for the defendant.

By the Court, MILLER, J. Upon the trial of this cause the plaintiff claimed to recover upon two grounds: First. That the defendant fraudulently and with the intent to defraud the plaintiff, represented to him that the ninety shares of stock of the La Crosse and Milwaukee Rail Road Company which the defendant sold to him was legally issued and a valid stock issued upon subscriptions fully paid to the corpo-

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ration. Second. That the defendant, for the purpose of fraudulently inducing the plaintiff to make an exchange of his land for the certificate of stock, falsely and fraudulently misrepresented to the plaintiff that the said corporation was in a sound, solvent and prosperous condition, with a large surplus on hand, and was in the receipt of a large income, and was able to pay from its income large dividends, which representations the defendant knew to be false, and of which fraud and falsity the plaintiff was ignorant, but that relying upon such representations being true and that the certificate was valid, he executed a deed of his real estate to the defendant and was thereby defrauded.

The plaintiff's counsel at the close of the evidence claimed the right to go to the jury generally, and among other things, especially insisted that the question of fraudulent representations should be submitted to the jury, and that if there was any allegation of variance between the pleadings and proofs, the defendant should show that he was misled by such variance, to the satisfaction of the court. The court refused to submit the question to the jury, and nonsuited the plaintiff, to which decision the plaintiff's counsel excepted.

It is insisted by the defendant's counsel that there was but one cause of action stated in the complaint, and that the allegation of fraudulent misrepresentations, as to the soundness and solvency of the company, was but a continuation or amplification of the preceding averments. Conceding that the defendant is correct in this position, yet if there was any material variance between the pleadings and the proofs, as the defendant did not claim that he had been misled, under the liberal rules inaugurated under the code of procedure the court should have allowed an amendment of the complaint, in conformity with the facts claimed to have been established on the trial.

Even although in the second alleged cause of action it was averred that the plaintiff relied upon the fraudulent representations, as to the condition of the company and that the

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certificate was valid, I do not deem it absolutely essential that both these allegations should be proved to be false. If it appeared satisfactorily that the former were false and made for the purpose of inducing the plaintiff to make the exchange with the defendant, I think this would be sufficient to establish a cause of action, and that the latter averment might be rejected as surplusage.

Assuming that the pleadings were sufficient, or that they should have been amended, I am of the opinion that the court erred in granting the motion for a nonsuit and in refusing to submit to the jury the question of fraudulent representations as to the soundness and solvency of the company, on account of which the plaintiff claimed to recover.

The proof upon the trial established that the plaintiff and the defendant had several conversations in reference to the stock of the La Crosse and Milwaukee Rail Road Company, ninety shares of which were finally exchanged by the defendant for the plaintiff's farm. At one time, being the first interview between them and some time prior to the exchange and sale, the defendant stated that the road was going to be the best road in the world; that it was in the hands of good business men; not a fancy man in the board; that it must pay large dividends and would be one of the best paying stocks in the world, and reimburse its cost in a few years. At a subsequent period, and immediately prior to the execution of the agreement made between the parties for the sale of the stock, he stated that it was going to be a very valuable stock and would pay from sixteen to twenty per cent dividends, and was worth more than Galena and Chicago rail road stock; that they estimated its earnings at \$400,000 a year; that it would earn \$500,000 a year, and that the month's earnings were at the rate of \$400,000 in a year; that the earnings exceeded the estimates, and they were going to cease making stock dividends after July, and were to pay cash dividends from the earnings. That the road would be able to pay a cash dividend of five per cent on the first day of

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January, 1857, and leave a large surplus. That the company was in a sound and prosperous condition, and that they had a large amount of assets on hand, even after building the first division of the road, to be applied towards building the second, and they did not mean to go on faster than they could realize from the assets, amounting to about six or seven hundred thousand dollars. He also represented that the firm of Chamberlin & Alden, of which he was a member, had received all the stock they were going to have on their contract.

In reference to the statements thus made by the defendant the evidence shows that the company turned out to be insolvent and worthless. In July or August, 1857, a little over one year after the contract was made and executed, their paper was protested. In May, 1859, their road was sold under one of the mortgages on it, and the company placed in the hands of a receiver. Its last dividend was paid in July, 1857, when the price of stock had run down to eleven and fifteen per cent in a hundred dollars. At the time of the commencement of the action, in May, 1858, the stock was worthless and of no value.

All these results may have occurred from subsequent financial disasters, without the knowledge or fault of the defendant; but I think there was evidence from which it might be fairly inferred that the company, at the time of the representations, was not in the condition that the defendant represented it was, and that the defendant had knowledge of that condition. Among other facts developed upon the trial, it appeared that the company had made a contract with the defendant and his partner Chamberlin, by which they were to receive \$200,000 more than was bid by one Cleaveland for the same job, and the company had agreed to turn out in payment stock to the amount of \$60,000 at fifty per cent of its par value; and that this contract was given to them at this advanced and exorbitant rate because five of the directors were interested in it. Such a transaction did not show soundness and solvency, but tended to establish a degree of

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financial embarrassment and recklessness which, under ordinary circumstances, must end in irretrievable disaster, bankruptcy and ruin.

It also appeared that \$150,000 of the capital stock assigned to the defendant to secure a loan of \$50,000, was sold by him for \$20,000, leaving a balance due him of \$30,000. The evidence does not show at what precise time this loan was made and the stock disposed of, at so severe a loss; but whether before or subsequent to the transaction between the plaintiff and the defendant, the facts elicited in regard to it tend to establish the embarrassed financial condition and the hopeless insolvency of the company.

The representation as to the amount of the dividends to be realized is rebutted by proof that they were far less than the amount stated by the defendant.

The proof also shows that after the defendant made the representation that the road was in the hands of good business men, the defendant admitted that the directors were a set of rascals.

The statement made, that Chamberlin & Alden had received all the stock they were going to have, on their contract, is contradicted by testimony that in the preceding autumn they received \$70,000 more of the stock, at seventy per cent. There are also other circumstances unnecessary to be stated at length, tending to show that the representations made by the defendant were false and untrue, and acts of the defendant which, unexplained, may be regarded as intended to deceive and defraud the plaintiff. There was an entire absence of evidence on the part of the defendant to show that they had a large amount of assets on hand after building the first division of the road, &c. and that they amounted to some six or seven hundred thousand dollars, and the general evidence in the case contradicts entirely this statement.

I think all of those matters bearing upon the question of fraudulent representations, were proper subjects for the consideration of the jury, to whom they should have been sub-

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mitted by the judge. They certainly had a bearing upon the question of intent on the part of the defendant to defraud the plaintiff.

Although the plaintiff was somewhat acquainted with the affairs of the company, by means of information derived from other sources, he testifies that he relied upon the representations of the defendant, in purchasing the stock. The defendant, as a director of the company prior to his resignation for the purpose of taking the contract, and as the general and fiscal agent of the company, was in a position to possess full knowledge of its character, its responsibility and financial condition. Even if the plaintiff had some general knowledge of the standing of the company, it was perfectly natural that he should place reliance upon the statements of an individual who had been connected with its management, who was intimately identified with its interests, and who ought to have been acquainted with its financial affairs, as he had assumed to represent that it was sound and prosperous, and that it had assets on hand to a large amount to be applied towards building another portion of the road, not then completed. Even although the plaintiff refused to sell this stock at a high price at one time, he may have done so because he believed that the representations made were true. It was at least a question for the jury whether the plaintiff was governed in whole or in part by his own knowledge of the matter.

It is said that the representations made by the defendant were mere expressions of opinion, and were most of them made long before, and without any reference to the contract actually made. They were statements of facts, without any qualification or restriction to the effect that they were merely intended to express an opinion. It is true, that some of the statements were made some time prior to the contract; but the principal representation immediately preceded it, and the agreement was made on the same day, and a very short time afterwards. Whether they were designed to influence and did influence the plaintiff, and whether they were made in

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reference to the contract, were also questions which properly belonged to the jury to decide, as the evidence stood at the time.

As a new trial must be granted for the reasons I have given, it is not important to examine the other questions which arise. They are somewhat intricate and difficult, and I forego their discussion for the present.

My opinion is, that a new trial must be granted, with costs to abide the event.

[ALBANY GENERAL TERM, March 2, 1863. Gould, Peckham and Miller, Justices.]

DOOLITTLE vs. TICE.

The 85th section of the code, which enacts that for the purpose of constituting an adverse possession, by a person claiming title not founded upon a written instrument, or a judgment or decree, land shall be deemed to have been possessed and occupied in the following cases only: 1. Where it has been protected by a substantial inclosure; 2. Where it has been cultivated or improved, was intended to provide that a party claiming to hold adversely should protect his claim by the erection of a substantial inclosure, and the language employed means that he shall erect an inclosure around the land, without relying upon a remote fence of a neighbor, inclosing that neighbor's land also.

Although the claimant may avail himself of a fence upon the line, yet it was not designed that a fence located far away from the premises, and including other lands, should be used as a means of protection to a claim of this character.

It was also intended that the inclosure should provide fixed, certain and definite boundaries of the claim made, by which it might be designated, marked and known.

It must be an inclosure of the lot alone, upon the lines claimed by the party, and not embracing premises adjoining, extending, in part, a great distance from the lines.

To constitute a compliance with the 2d clause of the section the land must not only be *cultivated* but *improved*.

Reaping alone cannot be considered cultivating. Nor can the keeping up of a fence already made, mowing the grass, and cutting brush, be deemed an improvement, within the meaning of the statute.

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The statute was intended to provide for the ordinary cultivation and improvement of lands in the manner in which they are usually occupied, used and enjoyed by farmers, for agricultural purposes, by sowing, plowing and manuring, and by the erection of buildings, &c. which may add to their value. *Per MILLER, J*

MOTION for a new trial upon exceptions, in a cause tried before Justice PECKHAM, at the Sullivan circuit, in April, 1863, when the judge ordered a nonsuit and dismissed the complaint. The action was brought against the defendant to recover damages for injuries to real property. The defendant interposed an answer of title to the premises. Upon the trial of the cause the plaintiff proved that in 1837 he took possession, and in connection with one Cudney, who had previously occupied the premises in conjunction with other lands, had the premises surveyed. About ten or twelve acres of land were cleared and fenced, except on the line between the lot in question and Cudney's farm. The plaintiff kept up a fence of rails, brush and poles; used the lot for a meadow and cut brush on it. The plaintiff swears that he claimed to own the lot, ever since he occupied it. Cudney's land was also inclosed, except along the line of the land claimed by the plaintiff. There was a log house on the lot, which the plaintiff, after he took possession, occupied, and afterwards let, at different times, to other persons. In 1851 the plaintiff put up a line fence between this lot and the Cudney farm, and in the spring of 1862, the defendant removed the fence, for which alleged trespass the plaintiff claims to recover damages.

The defendant claimed title to the land in question under a deed of the same upon a tax sale, executed by the comptroller of the state, and bearing date the 11th day of January, 1828. The defendant moved for a nonsuit, upon the ground that he had shown title to the premises. The plaintiff claimed the right to go to the jury upon the question of adverse possession, and upon the whole case. The justice refused to submit the case to the jury, and granted the motion for a nonsuit,

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and dismissed the complaint. The plaintiff excepted, and the justice ordered that the exceptions be heard in the first instance at the general term.

A. J. Bush, for the plaintiff.

Niven & Thompson, for the defendant.

By the Court, MILLER, J. From the facts elicited upon the trial I incline to the opinion that there was some evidence that the plaintiff claimed to hold the premises in question adversely. Although there is no proof that he claimed title, in so many words, to third parties, yet there are circumstances attending the possession from which it may be fairly inferred that such a claim was actually made by him. He was in possession by himself and by his tenants, keeping up the fences, cutting brush, and mowing the grass. I think these are open and notorious acts, and an unequivocal assertion of title which apprised the world of the nature of his claim, within the principle of adjudicated cases. (*See Lane v. Gould*, 10 Barb. 254.)

As the plaintiff's claim to hold the premises adversely for a period of twenty years and upwards, was not founded upon a written instrument, or a judgment or decree, he was bound in addition to establish, for the purpose of constituting an adverse possession; First. That the land upon which the alleged trespasses were committed had been protected by a substantial inclosure; or, Secondly. That it had been usually cultivated and improved. (*Code*, § 85.)

As to the first proposition, the evidence shows that prior to 1851 the land was only fenced on three sides, with rails, brush and poles, and there was no fence on the line between this lot and the Cudney farm. The Cudney farm was, however, inclosed with these premises, and it is insisted that this was in fact a "substantial inclosure" of them. The provision of the code referred to was intended to provide that a party claiming

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to hold adversely, where his claim was not founded upon a written instrument, or a judgment or decree, should protect his claim by the erection of a substantial inclosure. I think the language employed means that he shall provide the inclosure around the land, without relying upon a distant and remote fence of a neighbor, inclosing that neighbor's land also. And although he may avail himself of a fence upon the line, yet it was not designed that a fence located far away from the premises and including other lands, should be used as a means of protection to a claim of this character. It was also intended that the inclosure should provide fixed, certain and definite boundaries of the claim made, by which it might be designated, marked and known. It must be an inclosure of the lot alone, upon the lines claimed by the party, and not embracing premises adjoining, extending in part a great distance from the lines. It cannot fairly be claimed that the premises in controversy were protected by a "substantial inclosure," because they were inclosed in connection with an adjoining farm. It was not the plaintiff's land, alone, but both together, which were inclosed; a portion of the land being claimed by the plaintiff, and another portion belonging to the adjoining owner. The statute was not intended to provide for the inclosure of other lands, adjoining those claimed adversely, and in furnishing a substitute by adverse possession against a written title, meant that the party thus claiming should designate by boundaries what he actually claimed. This was the title he was bound to make out in place of a higher one. The fence on the Cudney farm did not constitute a part of the inclosure of the plaintiff's land, and there being only a fence upon three sides of the premises I think they were not protected by a "substantial inclosure," within the spirit and meaning of section eighty-five of the code.

As to the second proposition, it was proved that the plaintiff had kept up a fence of brush, rails and poles, which had been previously erected. He had also cut brush (although the na-

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ture and extent of the labor done in this respect, does not distinctly appear,) and had reaped the grass which spontaneously grew upon the land. All these acts might have been done by a mere trespasser, and there is no evidence that he adopted any of the means usually employed to improve the land so as to increase its value. He erected no buildings, and made no substantial improvements. He never plowed, sowed or tilled the land, and not a single crop was planted upon it by him. He reaped the fruits without really doing any thing to produce them. The land must not only be "cultivated" but "improved." Both cultivation and improvement are essential to make out a case within the provision cited. Reaping alone can scarcely be considered as cultivating; and this was all the cultivation the land received; nor can the keeping up a fence already made, mowing the grass and cutting brush, (with no proof that it was designed to improve the land,) be considered an improvement within the meaning of the statute. I think the statute was intended to provide for the ordinary cultivation and improvement of lands in the manner in which they are usually occupied, used and enjoyed by farmers for agricultural purposes; sowing, plowing and manuring, and by the erection of buildings, &c. which might add to their value. The land of the plaintiff was not thus cultivated and improved, and he does not make out a case within the second subdivision of the section quoted.

Although there was some evidence of adverse possession, yet the plaintiff failing to make out a case in other essential particulars, there was no error in the rulings of the judge; and a new trial must be denied, with costs.

[ALBANY GENERAL TERM, September 7, 1863. *Gould, Hogeboom and Miller, Justices.*]

LIKE vs. MCKINSTRY.

An action lies for slander of the plaintiff's title to personal property.

To maintain such an action the plaintiff must establish, 1. That the words were false; 2. That they caused an injury to him in reference to his title to the property; 3. That they were uttered maliciously, and in order to injure the plaintiff.

The plaintiff and defendant made a parol agreement, by which the former hired the farm of the latter, for one year from the 1st of April, 1861, with the privilege of sowing the farm to rye in the fall of 1861, and reaping the crop; the plaintiff to have the use of the barn and press, on the farm, to press the straw &c. The plaintiff sowed rye on the farm, in the fall of 1861, with the assent and assistance of the defendant. *Held* that the lease originally made was only legal and valid for one year from its commencement; but that the defendant, by assenting to, and assisting in, the sowing of the rye in the fall, sanctioned the stipulations in the lease, for the sowing and reaping of the crop, and virtually made a new agreement with the plaintiff, conceding the use of the farm for such further period as was requisite.

Held, also, that such new agreement was valid, and founded on a sufficient consideration, and gave to the plaintiff a good title to the rye, and the right to maintain an action for slander of his title.

A PPEAL from a judgment entered at the circuit and an order made at a special term, denying a motion for a new trial. The action was brought for slander of the plaintiff's title to personal property, and was tried at the Columbia circuit, in January, 1863, before Justice HOGEBOM and a jury.

The plaintiff hired and occupied a farm of the defendant, in the town of Livingston, Columbia county, for three years from April 1, 1859, to April 1, 1862, under a hiring from year to year by verbal agreement. The agreement for the last year, from April 1, 1861, to April 1, 1862, was made in March, 1861, and was by parol. By this agreement the plaintiff hired the farm for one year from April 1, 1861, for \$425 rent, with the privilege of sowing the farm to rye, in the fall, and reaping it; the plaintiff to have the use of the barn and press, on the farm, to press the straw of the rye to be sown, and slat wood off the farm to use in pressing the

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straw, and the privilege of the barn to thresh the rye in. The plaintiff sowed one hundred and thirteen bushels of rye, on the farm, in the fall of 1861. The defendant helped the plaintiff put in the rye, and while it was growing, on different occasions admitted that it belonged to the plaintiff. In March, 1862, the plaintiff offered the rye, then growing on the farm, for sale at public vendue. When the rye was offered for sale, the defendant said: "I forbid selling the rye; it is mine," in the presence of a number of farmers who attended the sale. The plaintiff said he would indemnify the purchaser. The rye was then sold, and was bid off by Peter Shaver for \$3.37½ per bushel sowing. It was proved on the trial to be worth from \$3.75 to \$5, per bushel, and one of the witnesses who was alleged in the complaint to have been present at the time when the rye was exposed for sale, testified that but for the defendant forbidding the sale and saying the rye was his, he would have bid \$3.75 per bushel, and with the privilege of pressing the straw with the press, and slat wood from the premises, it was worth twenty-five cents per bushel more.

It also appeared that the defendant, before the sale, consulted counsel as to his rights, by whom he was advised to go there on the day of sale and forbid the sale; that he did no more than forbid the sale, and say the rye was his. When the plaintiff rested the case on his part, the defendant moved for a nonsuit, and to dismiss the complaint. The motion was denied, and the defendant excepted. Upon the testimony being closed, the defendant insisted that on the whole case, as presented by the evidence, the plaintiff was not entitled to recover, and again moved the court to nonsuit the plaintiff. The court denied the motion, and the defendant excepted. The points raised appear in the opinion of the court. The jury rendered a verdict for the plaintiff, for \$60. The defendant moved for a new trial, on the minutes of the justice, which was denied, and judgment was entered on the verdict.

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J. C. Newkirk, for the appellant, (defendant.)

R. E. Andrews, for the respondent, (plaintiff.)

By the Court, MILLER, J. This action was brought to recover damages for slander of the plaintiff's title to personal property. It is somewhat of a novel character, and the first inquiry which addresses itself to the consideration of the court, is whether such an action can be maintained. Actions for slander to character and of the title to real estate are clearly maintainable. As they rest upon the fact that injury has been sustained, by analogy there would appear to be no reason why a party injured should not recover damages for slander of the title to personal property. In principle both remedies must stand upon the same foundation. "*Ubi jus, ibi remedium.*" "There is no wrong without a remedy," (1 *T. R.* 512; *Co. Lit.* 197, *b.*) is a maxim as old as the common law itself. And as the civil law was intended to redress all wrongs, no good reason exists why a party who has been injured by the slander of his title to personal property should be deprived of an action for damages, the same as when his private reputation is assailed, or an attack made upon the title of his real estate. It has been well observed, if a man has a right he must have a means to vindicate and maintain it, if he is injured in the exercise and enjoyment of it, and indeed it is a vain thing to imagine a right without a remedy, for want of right and want of remedy, are reciprocal. (*Ashley v. White*, 2 *Lord Raym.* 953, *per Holt*, C. J. *Winslow v. Greenbank*, *Willes*, 577, *per Willes*, C. J. *Vaugh. Rep.* 47, 253.)

There are but few cases reported in the books which have a bearing upon the question now considered, and it may not be inappropriate to refer to some of the leading authorities on the subject.

In *Broom's Com.* 514, 764, it is laid down, "words, written or oral, which falsely depreciate the value of chattel

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property, may be made the subject of an action, provided special damage ensue from them." (See also *Starkie on Slander*, 202.) In *Newman v. Zachary*, (*Aleyn.* 3,) also quoted by Bacon and Comyn, (*Bac. Abr.* 76, *B. i*; *Com. Dig.* 370, *C. 1*,) an action on the case was brought for slander to the title of personal property. Two of the plaintiff's sheep did stray, one of which being found again, the defendant, who was the plaintiff's shepherd, affirmed that it was the plaintiff's; whereupon the plaintiff paid for the feeding of it and caused it to be shorn and marked with his own mark. It was averred in the complaint that the defendant, knowing the sheep to be the plaintiff's, falsely and fraudulently affirmed to the bailiff of the manor, who had waifs and strays belonging to it, that this sheep was an estray, whereby the bailiff seized it, &c. It was adjudged that the action would lie, because the defendant by his false practice hath created trouble, disgrace and damage, to the plaintiff, and although the plaintiff have a cause of action against the bailiff, yet this will not take off his action against the defendant in respect to the trouble and charge he must undergo in the recovery against the bailiff. And Hale said, that if one slander my title, whereby I am wrongfully disturbed in my possession, though I have a remedy against the trespasser, I shall have an action against him that caused the disturbance. In *Ingram v. Lawson*, (6 *Bing. N. C.* 212,) it was held that a statement in a newspaper, that a ship of which the plaintiff was owner and master and which he had advertised for a voyage to the East Indies, was not a seaworthy ship, and that the Jews had bought her to take out convicts, was a libel on the plaintiff, in his trade and business, for which he might recover damages. In *Hill v. Ward*, (13 *Ala.* 310,) in an action for slander to personal property in claiming title to such property, when offered for sale as the property of another, it was held that the words should be set out, thus distinctly recognizing that the action would lie. In *Hargrave v. Le Breton*, (4 *Burr.* 2422,) it was held in

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regard to real as well as personal estate, that to maintain an action for slander of title, there must be malice, express or implied, and the words spoken must go to defeat the plaintiff's title. In *Tobias v. Harland*, (4 Wend. 537,) which was an action to recover damages for slanderous words spoken of articles manufactured by the plaintiff, whereby divers persons refused to purchase them, the declaration was held bad on general demurrer, because such persons were not named. Marcy, J. in his opinion, distinctly recognizes the right to maintain the action for misrepresenting the quality of goods which a person has for sale, where special damages are alleged and proven. In *Linden v. Graham*, (1 Duer, 670,) which was an action for slander of the title of real property, Bosworth, J. in his opinion, speaks of "words spoken of and concerning the title to property," without noticing or recognizing any distinction between real and personal property.

Applying the doctrine established by the authorities cited, in connection with the general principle that where a man has a temporal loss or damage by the wrong of another, he may have an action on the case to be repaired in damages, (1 Comyn. Dig. *Action on the Case*, A, 178; *Bac. Abr. tit. Actions B*,) I do not discover any marked feature or characteristic which distinguishes an action of slander of the title of personal property from that of real estate, and I think the action in the case at bar can be sustained and upheld.

It being quite clear that the action lies, it becomes important to inquire, in the next place, whether the plaintiff has made out a case within the rules essential to the maintenance of an action of this character.

For the purpose of maintaining an action for slander to the title of personal property, I think it must be established, 1st. That the words were false; 2d. That they caused an injury to the plaintiff in reference to his title to the prop-

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erty; and 3d. That they were uttered maliciously and in order to injure the plaintiff.

First. Whether the words uttered were false must depend upon the question whether the plaintiff was the actual owner of the property. This is an important inquiry, and perhaps the controlling question in the case. It is insisted by the defendant's counsel that the agreement between the plaintiff and the defendant for the hiring of the farm was a contract relating to an interest in land and a contract for the sale of an interest in land, or a contract for the leasing of land, for a longer period than one year, and not being in writing it was void. (2 R. S. 1st ed. 134, § 6. *Id.* 135, § 8.) The contract alleged to have been made for the hiring of the farm was for one year, and from the first of April, 1861, to the first of April, 1862, with the privilege of sowing and reaping the grain to be sown in the fall and of using the barn and press, on the farm, and of getting slat wood from it. It does not distinctly appear whether the slat wood was already cut on the farm, or whether it was intended that the plaintiff should have the privilege of cutting it. The point raised, therefore, that the right to cut slat wood was an interest in real estate, is not presented.

I entertain no doubt that the lease originally made was only legal and valid for one year from its commencement, and terminated at the expiration of that period. It being good only for a year, the plaintiff was thereby strictly cut off from the benefit of his agreement to reap the rye, unless there was a subsequent valid contract to that effect. In reference to the existence of another contract, the evidence shows that the rye was sown in the fall previous to the expiration of the lease. It was done with the approbation and the assent of the defendant, and with his co-operation and assistance. The defendant thereby sanctioned the arrangement previously made for the sowing and reaping of the rye, and virtually made a new agreement with the plaintiff for the use of the farm, for that purpose. Here was a contract binding upon

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the defendant which gave the plaintiff full title to the rye, even if he had none prior to that period. It is urged that there was no consideration for a new contract. I think that the rent of the farm was a sufficient consideration for the new agreement made to carry out merely what had previously been agreed upon, and constituted an important element in the original hiring. It does not exactly appear when the rent was payable, or when it was actually paid; but the defendant by allowing the plaintiff to go on the farm and put in the crop, and by assisting him in so doing, and by his repeated declarations, afterwards, that the rye was the property of the plaintiff, virtually said and agreed that in consideration of the rent the plaintiff was authorized to sow and to reap the grain sown in accordance with the prior understanding. This was a valid and binding contract, which the plaintiff had a right to enforce, and the grain belonged to him.

I do not deem it necessary to consider whether at the time the alleged slander was uttered, being prior to the expiration of the year, and while the plaintiff was still in possession of the premises, the defendant was authorized to use the expressions he did. Nor, with the views I entertain, is it important to discuss whether there was a revocation of a license given to reap the rye, and that the revocation made at the time when it is claimed the injury was done, merged and canceled the injury itself.

I think the plaintiff had title to the rye, and a right to reap it, and it thereupon follows that the words uttered by the defendant were false.

Second. Did the words cause any injury to the plaintiff in regard to his title to the property? I think it is quite clear that such was the result. It was proved on the trial that the rye was worth more money than it brought upon the sale. One witness swears that he was prevented from bidding by the announcement of the defendant, claiming the rye and forbidding the sale, and that he declined to bid on that account. He also states that he should have bid more

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but for this. The loss of this sale alone would support the action. (*Kendall v. Stone*, 2 *Sandf.* 279.) The inevitable and natural consequence resulting from such a declaration, among a large body of men assembled on such an occasion, would be to reduce the value of the property ; to impair the plaintiff's title and affect the sale. And such appears to have been the result.

Third. The question whether the words were uttered maliciously, and with the intent to injure the plaintiff, also presents an important inquiry. Without malice or an intent to injure, the action will not lie. (2 *Sandf.* 269. 5 *Barb.* 301.) This point does not appear to have been distinctly taken on the motion for a nonsuit when the plaintiff rested his case, and as no exception was taken to the charge of the judge, I infer it was unexceptionable in this particular. Perhaps it is covered by the motion made at the close of the trial, by the defendant. Conceding that it is raised, I think there was sufficient evidence to go to the jury upon that question. The proof showed that the defendant, in the presence of some one hundred persons, who were there to attend the sale of the rye and other property of the plaintiff, distinctly and unqualifiedly forbade the sale, and said the rye was his. He gave no reason, at the time, for this assertion, and made no explanation of his title, or as to how he claimed it. He had consented, previously, to its being sowed ; repeatedly, on different occasions, conceded that it belonged to the plaintiff, and never, up to that day, had pretended to claim it in the presence of the plaintiff. His language and his actions were a direct attack upon the plaintiff's title to the rye, and so far as the testimony goes, without any apology or excuse on his part at that time. If he intended to claim title upon the ground that he was acting under the advice of counsel that the rye was his property, and that he attended the vendue and forbade the sale in pursuance of that advice ; that in fact he was merely insisting upon his legal rights, I think he should have so stated at the time he forbade the

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sale. This explanation would have placed his claim upon the right ground, and in the minds of the jury who passed upon the question, might have exonerated him from all blame; at least from a charge of acting maliciously. Honesty and fair dealing required that this should have been done, and it was a mistake, at least an error of judgment to act otherwise. The evidence upon the subject of malice was fairly before the jury, and for any thing that appears was fairly submitted to them. There was certainly some evidence bearing on the question, and as it was entirely for the jury to decide, (2 *Sandf.* 279,) I do not see how their finding can be disturbed.

The remarks already made cover the points presented on the argument, and I am of the opinion there was no error committed on the trial. The judgment, therefore, should be affirmed, and the motion for a new trial denied, with costs.

[ALBANY GENERAL TERM, September 7, 1863. *Gould, Hogeboom and Miller*, Justices.]

ROTH & ROTH vs. WELLS.

A levy upon goods in a store, under an execution, is a continuing levy covering goods purchased by the judgment debtors subsequent to the levy and during the life of the execution, and placed in the same store; such goods being of the same general description as those levied on, and having been purchased to supply the place of goods sold by the debtors, after the levy, or as an addition to the original stock.

Goods and chattels of a judgment debtor, situated within the jurisdiction of the sheriff, are bound by the lien of the judgment from the time of the delivery of the execution, and no levy is essential to create such lien.

Goods levied upon, being in the custody of the officer, if a portion of them are removed and sold by the debtor, and others of a similar description are put in the same place, the property substituted takes the place of that which has been taken away, and becomes subject to the lien of the execution, without any new levy.

If under such circumstances, the debtor refuses, when called upon, to designate the property which he claims is not covered by the levy, he will be

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estopped from maintaining an action against the sheriff to recover the value of property taken by him under the execution.

Where goods levied on are left by the officer with the judgment debtor, and he confounds them with other goods, belonging to him, so that they cannot be distinguished, and the debtor refuses to point out the property levied on, he cannot complain if some of his own goods, not embraced in the levy, are taken by the sheriff.

APPEAL from a judgment entered at the circuit, and from an order of the special term, denying a motion for a new trial. The action was brought to recover the value of a quantity of goods taken by the defendant from the store of the plaintiffs, and was tried at the Rensselaer circuit in May, 1860, before Justice HOGEBOM. The defendant justified the taking as sheriff of the county of Rensselaer, by virtue of three executions in favor of John A. Aubray, against the plaintiffs. These executions were delivered to the defendant on the 24th of August, 1857. Their aggregate amount was \$1755.98, with interest from August 3, 1857. The plaintiffs claimed that on the 25th of August, 1857, the executions were settled, and that they gave the defendant their check upon a bank in Troy, for \$1804, with interest, and received from the defendant a receipt in full for the executions. They also delivered to the defendant, as collateral security for the check, their two notes, indorsed by David Dater, amounting to \$2000. The defendant claimed that the checks and notes were received conditionally, and that the receipt was given only at the earnest solicitation of one of the plaintiffs, to be used as a protection of his brother, whose property had been levied upon at Utica, under executions issued on the same judgments. The check not having been paid when presented at the bank, suits were brought by the defendant upon the check, and also upon the notes held as collateral. These suits were subsequently discontinued. Neither the check nor the notes were paid, and on the 18th of November, 1857, the defendant took from the plaintiffs' store goods appraised to be worth \$6635.23 to satisfy the executions. These goods were taken under a claim that the defendant had made

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a levy, on the 24th of August, upon the goods then in the store, and indorsed the same on the execution, and that in the alleged settlement made on the 25th of August this levy had not been abandoned. There was a conflict of evidence as to the levy being under and indorsed upon the executions, and upon most of the material questions in the case. Of the goods taken, but a portion were in store at the time of the alleged levy. A share of them had been purchased after the return day of the executions.

The judge, upon the trial, submitted it to the jury as a question of fact to be decided upon the evidence, whether a levy had been made by the defendant, as alleged by him, on the 24th of August. He also instructed the jury that if the check and notes had been received in payment of the executions, an agreement that the executions might be enforced in case the check was not paid, would be illegal, and the defendant would be liable for taking the goods. The judge further charged the jury that if a sufficient levy had been made, on the 24th of August, and the executions remained in force when the goods were taken, they might regard the levy as continued and covering the goods purchased subsequent to the levy, and during the life of the executions; such goods being in the same place, of the same general description as those levied upon, and being purchased to supply the place of goods sold by the debtor after the levy, or making additions to the stock. To this part of the charge the counsel for the plaintiffs excepted.

The jury rendered a verdict for the defendant. The plaintiffs, at the same circuit, moved for a new trial, upon the exceptions taken, and also for insufficient evidence. The motion for a new trial was denied, and the plaintiffs appealed.

Ira Harris, for the appellants.

W. A. Beach, for the defendant.

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By the Court, MILLER, J. It is insisted by the plaintiffs' counsel that the judge erred in charging the jury that if a sufficient levy had been made on the 24th of August, and the executions remained in force when the goods were taken, they might regard the levy as covering the goods purchased subsequent to the levy and during the life of the executions. It should be observed that the judge also added, in connection with the part of the charge objected to, that such goods must be in the same place, and of the same general description, as those levied upon, and be purchased to supply the place of goods sold by the debtors, after the levy, or in making additions to his stock. This objection presents the main point in the case, and involves the question whether a levy made at a particular time overreaches and includes property subsequently acquired during the lifetime of the execution and prior to a sale under it. Was it in fact a continuing levy covering goods afterwards received and placed with the property already levied upon, instead of what had been sold, or as an addition to the same stock? 2 R. S. p. 365, § 13, provides that whenever an execution shall be issued against the property of a person, his goods and chattels situated within the jurisdiction of the officer shall be bound from the time of the delivery of the same to be executed. (*See also Ray v. Birdseye*, 5 Denio, 619.) From this provision of the statute it would appear that the goods and chattels of the plaintiffs were bound from the time of the delivery of the executions, and no levy was essential to create the lien. This lien would be effectual during the lifetime of the executions, and by virtue of it the sheriff had a perfect right to seize and to sell the property subject to the lien. Whatever goods were acquired prior to the 24th of October were therefore subject to the lien, and liable to be sold during the life of the executions. The issuing of the executions and their delivery to the officer was then a constructive levy, which held the property until the return day of the process. There can be no question that during this period the sheriff could have proceeded to sell all

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the goods of the defendant under the levy he had made, and no further levy was essential during the time which the executions had to run. An actual levy having been made, and the property remaining in the hands of the judgment debtors, it would seem to be unnecessary that a new levy should be made on the property subsequently acquired. It was in one place ; one single stock of goods ; kept together in possession of the judgment debtors, as the agent of the sheriff ; for his benefit, to be delivered to him when demanded. The property was in custody of the officer, subject to his command, to satisfy the executions. After the property has been seized by the sheriff it is in the custody of the law or of one of its ministers, until a sale ; and a new levy under a second execution is unnecessary. (*Birdseye v. Ray*, 4 *Hill*, 160, 161. *Van Winkle v. Udall*, 1 *id.* 559. 17 *John.* 116.) The goods levied upon being in the custody of the officer, upon a portion of them being removed and sold by the debtors, and others of the same description being put there, I am inclined to think that the property substituted took the place of that which had been previously taken away. The charge of the judge embraced only such property, and it would be but reasonable and fair that a party who had assumed thus to remove the property without the authority of the officer, should not be permitted afterwards to claim that a prior levy did not cover that which he had put with it or in place of what he had sold and disposed of. It makes no difference that this specific property was not seized prior to the return day of the executions. It was subject to the lien of them. The executions bound the property, and it was liable to be sold under them. A levy had in fact been made upon other property of the party ; and it does not rest with the debtor to insist that the right of the sheriff was gone because he was indulged and the lien was not enforced.

Independent of the views already expressed, I am of the opinion that the plaintiffs having refused when called upon to designate the property which they claimed was not covered

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by the levy, are estopped from a recovery in this action. Where goods of a stranger are in possession of a debtor, and so mixed that the sheriff on due inquiry cannot distinguish them, the owner cannot maintain an action against him for taking them, until notice and a demand of the goods. (7 *Mass. Rep.* 123.)

So also if a person having charge of the property of another so confounds it with his own that it cannot be distinguished, he must bear all the inconvenience of the confusion; and he must distinguish his own property or lose it. (*Hart v. Ten Eyck*, 2 *John. Ch.* 108.) In the case at bar, the defendant had the legal custody of the goods. He had a special property in them for the purpose of making the amount due upon the executions. They were left with the plaintiffs subject to the lien of the executions. The plaintiff had no right to sell or dispose of them until the executions were paid. At most, they had but a right to what remained upon a sale of the goods after the executions were satisfied. Whether regarded as the judgment debtors, or as having charge of the property for the defendant, they assumed to sell and dispose of it, and confound it with their own, so that it could not be distinguished. When called upon for that purpose, they refused to point out the goods which were there when the defendant made the levy. They have no right, therefore, to complain that some of their own goods were taken, and are precluded thereby from a recovery in this action.

It is also alleged that upon the question whether a levy was in fact made on the 24th of August, the verdict is against the evidence, and that no levy was in fact made. There was certainly some evidence to show that a levy was made. The property was in view of the officer. The evidence shows that he went to the store where the goods were, and looked them over. They were under his control, and it is claimed that the levy was indorsed upon the executions. Although there was a conflict as to the levy and the indorsement, yet it cannot be claimed that there was such a preponderance of evi-

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dence in favor of the plaintiffs as to authorize this court to set aside the verdict upon that ground.

The same remarks are applicable upon the question of payment of the executions. The whole evidence was fairly submitted to the jury, and they have found adversely to the plaintiffs upon that point, and their finding cannot now be disturbed.

The question whether any of the goods purchased after the 24th of October were taken by the executions depended upon the testimony of one of the parties, and was fairly left to the jury as a question of fact. The court charged the jury that the defendant was liable for the goods purchased after the 24th of October, and gave proper instructions in regard to the credibility of the party upon whose testimony the claim for those goods was based. The jury having found against the plaintiffs, they are concluded.

A new trial must be denied, and the judgment affirmed, with costs.

[ALBANY GENERAL TERM, September 7, 1863. *Gould, Hogeboom and Miller, Justices.*]

SCHOONMAKER vs. CLEARWATER & WOOD.

A judgment rendered by a justice of the peace who is related to either of the parties is absolutely void.

The statute having declared that no judge of any court "can sit," in such a case, all the acts of the justice are *coram non judice* and of no effect whatever; and this although no objection was made to the exercise of jurisdiction, at the trial, and no proceedings have been had to set aside or vacate the judgment.

THIS was an action of trover brought by the plaintiff to recover the value of certain articles of personal property alleged to have been converted by the defendants. The answer denied that the defendants possessed the property

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mentioned in the complaint, or that they wrongfully detained the same from the plaintiff, or that the said property belonged to the plaintiff. The cause was tried at the Ulster circuit, on the 15th day of July, 1853, before the late Justice WATSON and a jury, and upon that trial the following facts were proved: On the 20th day of December, 1851, one Andrew Roosa, who was then the owner of the property in question, mortgaged the same to the plaintiff. The mortgage was filed in the clerk's office in the town of Marbletown, (the town in which Roosa lived,) in February, 1852. It was given to secure the payment of \$175, on or before the first day of September, following its date, with interest. It also contained the following clause, to wit: "But in case the said Andrew Roosa shall, on or before the first day of September, 1852, pay to the said Andries Schoonmaker, the said debt and interest, then the sale and transfer be void; but in case of the non-payment at the time above mentioned, or in case the said Schoonmaker shall at any time deem himself insecure, then, and in either of these cases, it shall be lawful for the said Andries Schoonmaker, to take possession of the said property." The defendants had a store of goods at Highfalls, in the county of Ulster, and did business there under the name of Clearwater & Wood. James H. Elmendorf was a full cousin of the defendant, Wood. And there was some evidence tending to show that he was a second cousin of Clearwater. On the 28th of May, 1852, the defendants commenced an action against the said Andrew Roosa, before the said James H. Elmendorf, who was a justice of the peace of the town of Marbletown, to recover a *partnership* debt; and on the 23d day of June, 1852, they recovered a judgment before the said Elmendorf for the sum of \$82.22, damages and costs. On the same day an execution was issued upon the said judgment and placed in the hands of one Jacob Yaple, a constable, for collection. Yaple, by the direction of the defendant, Clearwater, levied upon the property in question, which at the time was in posses-

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sion of Boosa, and finally sold the same on the first day of July, 1852, Clearwater receipting the execution for the firm. Between the day of the levy and of sale, the plaintiff demanded the property of said Yaple and of Clearwater, and forbade the sale. The jury found a verdict in favor of the plaintiff for the sum \$193.88, damages, upon which verdict a judgment was perfected, with costs. The defendants having prepared and served a case with exceptions, now moved for a new trial, having brought the proceedings into this court by appeal.

J. Hardenburgh, for the appellant.

T. R. Westbrook, for the respondent.

By the Court, MILLER, J. The defendants justified the sale of the property claimed by the plaintiff, on the trial of the cause, under an execution issued upon a judgment rendered in their favor by a justice of the peace, who was related to one or both of the defendants, and the judge upon the trial held that the judgment was absolutely void and no protection to them. It is now insisted by the defendant's counsel, that the judgment was not void, but merely voidable, and the plaintiff being a stranger could not question it, in this action. It is declared by statute that no judge of any court can sit as such, in any cause to which he is a party, or in which he is interested, or in which he would be excluded from being a juror by reason of consanguinity or affinity to either of the parties. (2 R. S. 275, § 2.) While it is conceded that this provision of the statute applies to a justice of the peace, it is said that as no objection was made and no proceedings had to set aside or vacate the judgment, it remains in full force and would be valid and good until set aside for that reason.

It therefore becomes an important inquiry how far the courts have gone in pronouncing such judgments absolutely

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void, and as it is claimed to be still an open question, I will refer to some of the leading cases where the subject has been discussed and adjudications had.

In *Edwards v. Russell*, (21 *Wend.* 63,) which was a certiorari from a justice's judgment, it appeared that after issue joined and the return of a venire, the defendants moved for a nonsuit on the ground that the plaintiff and the justice were *cousins*, offering to prove the fact should it be denied; and the justice returned that such was the general understanding, and rendered judgment against the plaintiff for the costs. The court held the judgment void and affirmed the judgment of the common pleas reversing it. Cowen, J. remarked: "Where there are none other [judges] as in case of a justice of the peace, he cannot issue process. Such an act would be nugatory and void, for he cannot sit to receive the return. The objection meets him at the threshold; and if he issue process inadvertently, he ought simply to withdraw himself from the cause. *He cannot sit*, says the statute. The meaning is not merely that the interests of the parties are unsafe, but the general interests of justice. Decency forbids that he should be seen acting either for or against his father, brother or cousin, &c." Again, the learned judge says "any judgment rendered by him is therefore void." In this case the question was distinctly presented by the return of the justice.

In *Foot v. Morgan*, (1 *Hill*, 654,) a motion was made to set off a judgment in favor of the defendant, obtained in a justice's court against a judgment rendered in favor of the plaintiff, in the supreme court. The motion was opposed upon the ground that the justice's judgment was void for want of jurisdiction, and it was shown that Morgan, the defendant, was the real plaintiff before the justice and was related to him. Cowen, J. cites the case of *Edwards v. Russell*, (21 *Wend.* 63,) and says: "The judgment rendered by him is there said to be void. It is *coram non judice*, and may be questioned collaterally."

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In *Post v. Black*, (5 Denio, 66,) where the question arose upon a justice's return to a *certiorari*, stating the fact of his relationship to one of the parties, the court reversed the judgment of the justice upon that ground. McKissock, J. cites the statute, and refers to 1 *Hill*, 654, and 21 *Wend.* 63, as authority. The question was presented in the case itself, and did not arise in a collateral proceeding.

In *Oakley v. Aspinwall*, (3 Comst. 547,) the court of appeals vacated a judgment of reversal and ordered a re-argument, because one of the judges was related to one of the parties; although the party was a mere surety for another and fully indemnified against the consequences of the suit, and the judge had remained on the bench at the special request and solicitation of the counsel for the party making the motion. The court held that when a judge is disqualified to sit, by reason of consanguinity to one of the parties, he cannot sit even by the consent of both parties; and if he does the judgment will be vacated. Hurlbut, J. who delivered the prevailing opinion, in commenting upon the statute, says: "The exclusion wrought by it is as complete as is in the nature of the case possible. The judge is removed from the cause and from the bench; or if he will occupy it, it must be as an idle spectator and not as a judge. *He cannot sit as such.*" Again he adds: "He cannot sit says the statute. It is a legal impossibility, and so the courts have held it," citing *Edwards v. Russell*, and *Foot v. Morgan*. Bronson, J. dissented, holding that there was no authority for the doctrine that the judgments were void, in courts of superior and general jurisdiction, although by implication he seemed to concede that some of the cases cited held the other way in reference to judgments and proceedings of inferior courts, and officers exercising special and limited powers.

The soundness of the prevailing opinion in the case is also questioned by Strong, J. in *The People v. Cline*, (23 Barb. 200,) the learned judge claiming that the doctrine was not sustained by an actual majority of the judges of the court

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of appeals. Four of the seven judges who took part in the proceeding were in favor of granting the motion to vacate the judgment.

In *Converse v. McArthur*, (17 Barb. 410,) it was decided that an order for the support of an indigent parent, made by a court of sessions, consisting of the county judge and two justices of the peace, one of the justices being also a superintendent of the poor, and joining in the application and notice and in the motion for the order, was void, even although the order was entered by consent of the attorney of the son. Hand, J. expressed an opinion that the order was void and that the statute and the case of *Oakley v. Aspinwall* were decisive. The case involved the construction of the provision of the statute, (2 R. S. 275, § 2,) before cited.

In *Paddock v. Wells*, (2 Barb. Ch. 331,) Chancellor Walworth, after quoting from Judge Cowen's opinion in *Edwards v. Russell*, says that he is "not prepared to say that the judgment rendered in such a case is absolutely void where there was nothing before the judge, at the time he rendered such judgment, to show that the real party in interest in the suit was related to him either by affinity or consanguinity, as in the case of *Foot v. Morgan*, (1 Hill, 154,)" and suggests that the judge should refuse to hear the cause unless both parties, upon being informed of the fact, shall join in a request that he hear and decide it. Although the chancellor may be considered as disapproving of the doctrine laid down in the cases to which he refers, his views as there expressed can scarcely be regarded as overruling it. The decision of the court of appeals in *Oakley v. Aspinwall*, although made by four of the seven judges, was held to be controlling in that case, and perhaps should be considered as settling the question so far as the principle it establishes is concerned. I am also inclined to the opinion that the weight of the authorities which I have cited preponderates strongly in favor of the doctrine, that a judgment rendered

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by an officer, related to either of the parties, is *absolutely void*, although that question was not distinctly presented in most of them. More especially is such the case in courts of special and limited jurisdiction, whose powers are derived from the statute alone.

The statute is very explicit that he cannot sit as a judge in any such case. Its language is very plain that "no judge of any court can sit as such in any cause," &c. "in which he would be excluded as a juror by reason of consanguinity or affinity to either of the parties." Does it mean that he may sit if not objected to; that his sitting may be waived by the parties; that none but the parties can object, and that unless objected to in the proceeding he can sit? If it did, then it would be a construction qualifying this very emphatic language, so as to confine it to his sitting in some cases and being excluded in others. The statute never was intended for any such purpose. Its design, spirit and object was to prevent corruption and favor in our courts of justice, and to free them entirely from even a suspicion of bias or partiality. It was, I think, intended to make the test of relationship an essential element of jurisdiction, which could not be waived or avoided. Its language is broad, clear and emphatic, and when in violation of it a judge assumes to do what he is most emphatically prohibited from doing, all his acts are *coram non judice*, and of no more effect than if a stranger had thus taken upon himself powers of such a character, without a semblance of right or authority. He is entirely without jurisdiction of the person of the party, because the law says *he cannot sit*, and being without authority, his exercising jurisdiction is not an error of judgment alone, to be corrected on review before a higher tribunal. It does not present the case of an inferior court, which has acquired jurisdiction and errs in exercising it, but one where there is an entire failure of original jurisdiction, which renders the whole proceeding void and of no effect. (*See Hard v. Shipman*, 6 Barb. 621.)

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The cases cited by the defendant's counsel, to establish the proposition that the judgment was merely voidable, are not analogous, and do not sustain that doctrine. In *Lamoure v. Caryl*, (4 *Denio*, 370,) where in a justice's court the plaintiff's claim and the defendant's set-off together exceeded \$400, and the justice gave judgment for the balance, the justice had jurisdiction of the person and subject matter and only exceeded his powers. In *Koon v. Mazuzan*, (6 *Hill*, 44,) title to lands came in question, on the trial before the justice, and it was held that the statute did not mean to deprive him of jurisdiction absolutely, but left him to judge, and if he made a mistake the judgment was voidable. Here the justice had jurisdiction also, and committed merely an error of judgment. The same remarks will apply to *Willoughby v. Jenks*, (20 *Wend.* 96.)

In *Tiffany v. Gilbert*, (4 *Barb.* 320,) a judgment was rendered by a justice of the peace not residing in the same town with either of the parties, nor in an adjoining town, in violation of the statute, and it was held that the jurisdiction being local, by statute, the judgment was not *coram non judice*, but erroneous merely. The statute (2 *R. S.* 226, § 8,) does not prohibit the justice from sitting in such a case, and the error was of that class which could have been waived by an appearance.

In any view in which the question may be considered it appears quite clear that there was an entire want of jurisdiction in the justice and his proceedings were utterly void. It was very much like the case of a justice who is a tavern keeper, and who is forbidden to act on grounds of public policy. (See *Low v. Rice*, 8 *John.* 409; *Clayton v. Per Dun*, 13 *id.* 218.) He is prohibited from acting in any such case, and the judge decided properly in holding the judgment void.

The other objections taken are not available, and a new trial must be denied, and the judgment affirmed, with costs.

[ALBANY GENERAL TERM, September 7, 1863. Gould, Hogeboom and Miller, Justices.]

KOLLS vs. DE LEYER, impleaded, &c.

Where a married woman, having a separate estate in lands, conveys the same by deed with covenants of seisin and against incumbrances, she is bound by the covenants, and liable for a breach thereof; such covenants being directly beneficial to her separate estate, inasmuch as their effect is to assure the title and enlarge the purchase money.

DEMURRER to complaint. The complaint alleged that the defendant, Margaretta De Leyer, wife of the defendant, Anthony De Leyer, being possessed of a separate estate in lands, conveyed a portion thereof to the plaintiff, by a full covenant warranty deed, including a covenant that the premises were free from incumbrances of every description. The husband united in this deed so far as to convey his interest if any he had, but he did not join in the covenants of warranty. It was further alleged that at the time of making this conveyance the premises were subject to the incumbrance of certain unpaid taxes, which were a lien thereon, and which the plaintiff had been compelled to pay. This action was brought to recover the amount so paid, as being a charge on the wife's remaining separate estate. Demurrer for various causes.

George H. Fisher, for the plaintiff. I. The only question of importance is whether, under the circumstances stated, an action lies to charge the remaining separate estate of the defendant, a married woman, with the damages which have resulted from the breach of warranty. The cases and the law are summed up in *Yale v. Dederer*, (22 N. Y. Rep. 450,) and the result may be stated in language used by the court of appeals, in the decision of that case, viz: "In order to create a charge, &c. on the estate of a married woman, the intention to do so must be declared in the contract, *or the consideration must be obtained for the direct benefit of the estate itself*. In this case, the contract is the warranty contained in the deed. The consideration was the consideration

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expressed in the deed. It is submitted that no possible consideration could move more directly to the estate, for its benefit, than a consideration paid to the grantor, for a conveyance of a portion of that estate. The court will not inquire in such a case whether the sale was, on the whole, a favorable one for the estate. The "benefit to the estate" spoken of, is a technical expression, having reference to the connection of the transaction with the estate, and not to the nature of the transaction, whether favorable for the estate or otherwise. Moreover, in a transaction, fair on its face, in which there is no suggestion of fraud, illegality or attempt of any kind to impose upon, or take advantage of one side or the other, the court will presume that the transaction was mutually beneficial.

II. It is further observable that this incumbrance was a *tax*; and it does not admit of doubt, that the payment of a tax, lawfully imposed on an estate, or a portion of an estate, is for the benefit of *that estate generally*, or for the benefit of the whole estate.

III. It is settled that the joinder of a defendant *more than* is necessary, does not justify a demurrer. The "defect of parties," spoken of in the code, is a *deficiency of parties*. (*Peabody v. Wash. Ins. Co.*, 20 Barb. 339. 8 How. 389. 17 N. Y. Rep. 592. 12 How. 134. 14 *id.* 517. 16 *id.* 325.)

IV. If it be objected that the complaint is not sufficiently definite and certain to lay the foundation for a judgment, a motion for that object would be proper, and not a demurrer.

F. Byrne, for the defendant.

By the Court, BROWN, J. This is a demurrer to the plaintiff's complaint. The causes of demurrer are very numerous, and all of them but one very frivolous.

The defendant is a married woman, having a separate estate of her own. Prior to the first day of February, 1858,

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and since the passage of the acts in regard to married women, and giving them the right to acquire, hold, use, grant and convey real property the same as *femes sole*, she acquired by purchase a lot of ground in the twelfth ward in the city of Brooklyn, the title to which she held in fee, in her own right. On the 15th day of February, in the same year, being so seised of the said lot of ground, she conveyed the same to the plaintiff, by the usual deed of conveyance with covenants of seisin, and that the same were free from incumbrances of every description. There has been a breach of the last of these covenants, the estate at the time being incumbered with certain taxes which the grantee (the plaintiff) has been compelled to pay to save the estate from sale, &c. All these facts appear by the complaint.

The question raised by the demurrer is whether the duty, debt or obligation created by the covenants in the deed, were directly beneficial to the estate of the grantor. This cannot be a debatable point. It is too plain, I think, for argument. The obvious effect of the covenants, in a deed of conveyance, is to assure the title and enlarge the purchase money. No one doubts that the reason why the grantee demands and the grantor makes these covenants, is to afford the former a complete indemnity to the extent of the purchase money should the title fail. This duty assumed by the grantor under the contract may be, and often is, the principal inducement to the purchase. It enlarges the purchase money, and thus to an extent more or less is clearly for the benefit of the estate of the grantor. It may be said, although the remark is not necessary to the decision of the demurrer, that covenants of warranty, seisin, and quiet enjoyment, are incident to and usually attend upon conveyances of real estate, and in the absence of all limitation and restraint upon the power of a married woman, the legislature when conferring the right to acquire, use, grant, devise and convey real property in the same manner as *femes sole*, must have intended conveyances

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in the usual manner and with the usual covenants to assure the title.

The order overruling the demurrer should be affirmed, with costs.

[KINGS GENERAL TERM, March 9, 1864. *Brown, Lott and Scruggan*, Justices.]

In the matter of BORNSDORFF and others vs. LORD, ex'r &c.

Prior to the code there were known in the equity practice two modes of proceeding to revive a suit; one under the revised statutes, in the cases provided for by it, by summary application founded on petition or affidavit; and one by filing a bill of revivor.

The revivor on motion, under section 121 of the code, although it has a wider range as to the cases in which it is applicable and necessary, and has a more limited period within which the motion can be made, still, in effect, stands in the place of the summary application, and the supplemental complaint stands in the place of a bill of revivor.

And as under the former practice it was not necessary to obtain from the court leave to file a bill of revivor, so it is now unnecessary to apply to the court, by motion, for leave to continue the action against the executor of a deceased defendant, by filing a supplemental complaint; although more than a year has elapsed since the death of the party. CLERKE, J. dissented.

A PPEAL from an order made at a special term, denying the motion of the plaintiff for leave to continue the action against the executor of the defendant, who had died, by filing a supplemental complaint.

BARNARD, J. The notice of motion in this case is for an order giving leave to the plaintiff to continue the action against the executor of the deceased defendant by filing a supplemental complaint. The motion was not made till after the expiration of a year subsequent to the death; and was denied at special term.

From the notice it is evident that the motion was in effect a motion to be allowed to continue the action. Such a motion cannot be entertained after the expiration of a year from the death. (*Code*, § 121.)

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It is claimed, however, that in this case the fact of judgment having been entered against the defendant, and subsequently set aside on the ground that it was so entered after the defendant's death, either prevented the year from commencing to run till after the judgment was set aside, or formed an excuse for not making a motion during that period. The section however is absolute and peremptory that the motion must be made within a year after the death. The language of the section, so far as this is concerned, is clear, explicit and unambiguous. There is no rule by which the court can construe this language into authority to deduct out of the period which may have elapsed between the death and the motion any portion thereof for any cause whatever, or to say that the year shall begin to run from any period other than that of the death of the party, or to allow of any excuse for not making the motion within the year.

But regarding the motion as one simply for leave to file a supplemental complaint to continue the action, the question arises whether in that view it is necessary or proper to apply to the court for leave to file a supplemental complaint. The appellant contends that it is necessary to make such application, and cites in support of his position, *Greene v. Bates*, (7 *How. Pr. Rep.* 296;) *Chapman v. Foster*, (15 *id.* 241;) *Coon v. Knapp*, (13 *id.* 175;) *Gordon v. Sterling*, (13 *How.* 405;) *Johnson v. Williams*, (2 *Abb.* 229.)

In the cases of *Coon v. Knapp* and *Gordon v. Sterling* no question was raised as to the practice to be pursued in filing a supplemental complaint under section 121, and the opinions of the court do not in the slightest degree touch on the practice to be pursued in such case.

The case of *Chapman v. Foster* was a motion made by the defendant Foster to dismiss the complaint because the plaintiff had not revived the action against the representatives of a deceased co-defendant. This motion only raised the question whether the defendant Foster had a right to make such motion. The court held he had. In the course of the opin-

ion the court incidentally say the plaintiff must obtain leave to file a supplemental complaint on a motion made for that purpose. This point however was not before the court for decision, nor was it necessary for the decision of the case. It is a mere *obiter dictum*, and was evidently made without any consideration of the point.

The case of *Greene v. Bates* appears also to be a case where the defendant moved to dismiss the complaint because the representatives of a deceased plaintiff had failed to continue the action. The only questions were whether a defendant could make such a motion, or whether he could move to revive the suit by making parties the representatives of the deceased party. The court held that he could do neither, but that the course to be pursued in such case was to have an order entered, requiring the plaintiff, in case of the death of a defendant, or the representatives of the plaintiff in case of the death of the plaintiff, to file a supplemental complaint of revivor within a certain specified time; or that in default thereof the complaint be dismissed. The judge in his opinion says, it is true the time has gone by when an order continuing the suit may be made, but it may be made on an application and leave obtained to file a supplemental complaint. The judge then proceeds: "The code is entirely silent as to the practice to be pursued in such a case when the suit has been suspended over a year after the death of the party, except that it must be continued on a supplemental complaint when the plaintiff applies to continue it after the year has gone by. I am of opinion however that we must regard the former practice in chancery as furnishing the mode of proceeding in such case." It is evident that when the judge spoke of making application and obtaining leave to file a supplemental complaint, his attention had not been drawn to the former chancery practice on the subject, nor to a due consideration of the practice now to be pursued in such case.

The cases of *Johnson v. Williams* and *Williams v. Johnson*, (2 *Abb. Pr. Rep.* 229,) were cross suits, and it was held

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at the special term of this district, that "From the language of section 121 it is evident that the permission of the court, on motion, to continue the action, must be obtained whether the continuance of it is sought within or after the expiration of the year."

The language of this section, however, in our view clearly establishes two modes of proceeding; one by motion and one by supplemental complaint. It says within a year, the court on motion, after a year, on supplemental complaint. This is a clear antithesis. The language is not that within a year the court may on motion allow a continuance, and after a year may on motion allow a supplemental complaint to be filed; but it is that after a year the court on a supplemental complaint may allow, &c. This does not authorize the court to entertain a motion for leave to file a supplemental complaint; nor does it require such motion to be made. The plaintiff has as clear a right to present his supplemental complaint without asking leave of the court to do so, as he has to make a motion within the year without previously obtaining leave so to do. Neither in the one case does the making the motion, nor in the other the presenting of the supplemental complaint, revive the action of itself; the order of the court to that effect must be obtained.

The mode of obtaining such order under this section within the year is clear. It can be done on motion, or in other words the plaintiff can make a motion for the order, and if the court on hearing both sides sees proper to continue the action it grants the order, the same as on any other motion; but after the expiration of the year the section does not permit a motion; for when it says the motion may be made within one year it is a clear exclusion of authority to make it after that time. To say that the court may after the year allow the action to be continued on a motion made upon a supplemental complaint, would be to ignore the section, and to allow an action to be continued on motion after the year; for it is manifest that it makes no difference what name is

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given to the paper on which the motion is founded, whether it is called affidavit, petition or complaint, the substance being the same. It is still but a motion, and the relief obtained is obtained in the same manner and by the same proceedings as the relief is obtained on an ordinary motion made on affidavits. It has already been observed that the language of the section, neither by its express terms nor by any reasonable construction, authorizes or requires a motion for leave to file a supplemental complaint of revivor.

Thus then we see that, so far as the language of the section is concerned, neither a motion to continue nor a motion for leave to file a supplemental complaint is authorized or required after the expiration of the year.

But it will be asked how is the court to allow an action to be continued on supplemental complaint after the year? By reference to the law and practice as it stood prior to the code, and to different modes of proceeding on motion, and on bills of revivor which were well understood and recognized at the time of the passage of the code, the answer to this question is plain. Prior to the code there were known in equity practice two modes of proceeding to revive a suit; one under the revised statutes in the cases provided for by it, by summary application founded on petition or affidavit, and one by filing a bill of revivor. The revivor on motion under section 121, although it has a wider range as to the cases in which it is applicable and necessary, and has a more limited period within which the motion can be made, still, in effect, stands in the place of this summary application, and the supplemental complaint stands in the place of a bill of revivor.

Again; a proceeding by motion was always understood as a summary application on notice to the opposite party, founded on petition or affidavit, for the relief granted, which application was opposed on affidavits setting forth substantially the grounds of opposition; whereas a proceeding by a bill of revivor was in the nature of an action, in which the defendant set up his objections to a revivor by demurrer, plea or answer,

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and the issue made by the bill, demurrer, plea or answer was heard and decided as solemnly as any other issue joined.

There can be no question but the word "complaint," as used in section 121, is used as synonymous with the old terms of "bill" and "declaration." Construing the section then by the light of the practice formerly existing and the then acknowledged distinction between proceeding by "motion" and by "bill," the result follows that the practice upon proceeding by supplemental complaint under this section is the same as obtained formerly upon a bill of revivor, since the code contains no provisions either regulating the practice on such a complaint, or inconsistent with the former practice on bills of this character. Now as the law stood prior to the code it was not necessary to obtain leave of the court to file a bill of revivor. (2 *Barb. Chan. Pr.* 48. 3 *Paige*, 206.)

Indeed a motion for such leave would be supererogatory. The object of filing the complaint is to bring into court the parties against whom the suit is to be revived. If they did not contest the propriety of the revival, an order of revival was entered of course, *pro confesso*, but if they did litigate then they presented their objections by demurrer, plea or answer, forming an issue which was tried and disposed of in the regular way.

This being the object of and course of proceeding on a bill of revivor, the court certainly would not on a motion for leave to file such a bill, hear any objections to the filing of the bill, for that would be to prejudge the issue to be tried; and unless they did hear such objections a motion would be of no practical use. It was therefore settled that it was not necessary to obtain leave to file such a bill.

The framers of the section in question certainly did not intend to allow an action to be revived on summary application irrespective of the time when such application should be made. If such had been their intention they would have left out all that is said about supplemental complaint. Yet the construction contended for by the respondent would

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make such to be their intention, since it is obvious that the application is equally summary if made on a motion founded on a paper called a supplemental complaint as if made on a paper called a petition or an affidavit. A substantial difference was intended, and not a mere difference of nomenclature.

The framers of the section no doubt had in view the old distinction of proceeding by motion, and by bill of revivor, and meant to adopt it. Thus then we see that neither by the section itself, nor by the practice as it existed before the code, was a motion for leave to file a bill of revival necessary or proper.

The order below must be affirmed, with costs of appeal.

SUTHERLAND, J. concurred.

CLERKE, J. (dissenting.) I still adhere to the view taken by me in *Johnson v. Williams*, (2 *Abb. Pr. Rep.* 229.) I think the codifiers intended to alter the practice of the court of chancery in this respect, and that the party should obtain the permission of the court before he continues his action by a supplemental complaint. There is no doubt a want of accuracy in the language employed. But I think it means that within the year the court may, on a motion founded on an affidavit, allow the action to be continued, and after the expiration of the year, on a motion founded on the intended supplemental complaint. The permission of the court, first, seems to be indispensable from the whole tenor of the section; and if this is so, the above interpretation is the only one consistent with such an intention.

Order affirmed.

[NEW YORK GENERAL TERM, May 4, 1863. *Sutherland, Clarke and Barnard*, Justices.]

KELLOGG vs. AMES and others.

On the 7th of December, 1857, P. executed a bond and mortgage to B., and on the 26th of July, 1858, P. and wife conveyed the mortgaged premises to D. subject to the mortgage, D. assuming and covenanting to pay the mortgage as a portion of the purchase money. D. afterwards, and previous to July 26, 1859, *paid the mortgage* to the mortgagee, but satisfaction was not acknowledged. On the 26th of July, 1859, the bond and mortgage were delivered by B. to D. together with an assignment executed with a blank for the name of the assignee. On the 30th of July, 1859, D. delivered the bond and mortgage and assignment to K. & P. as collateral security for his stock note for \$1500 therewith delivered to K. & P., receiving from them, at the same time, his protested draft for \$1500, then held by K. & P. On the 30th of August, 1859, the name of the plaintiff was inserted in the blank left in the assignment, and the same, together with the bond and mortgage, were re-delivered to the plaintiff, in trust for the firm of K. & P. of which he was a member, D. receiving therefor his stock note for \$1500, and the firm canceling debts and evidences of debt they held against him for the remainder of the amount nominally or apparently due on the bond and mortgage, and on the same day the assignment was duly recorded. On the 8th of September, 1859, D. conveyed the mortgaged premises to the defendant A. in fee; the deed stating on its face a consideration of \$8000. *Held*, that there was no necessity, if there was a place, for the doctrine of *merger*. That the mortgage debt having been *paid* by D., the owner of the fee, who had assumed and covenanted to pay it, such payment was a satisfaction of the mortgage debt, and *extinguished* the lien and vitality of the mortgage as fully as payment by P. the mortgagor would have done; whatever might have been the intention of D. and B. And that it was not in the power of D. and B., by any arrangement between them, to keep the mortgage alive, for the benefit of the party making the payment. LEONARD, J. dissented.

APPEAL by the defendant Ames from a judgment entered at a special term, after a trial at the circuit before a justice of this court without a jury. The action was brought for the foreclosure of a mortgage executed by the defendant George Philbrook to H. H. and T. H. Butterworth, on the 7th of December, 1857, payable in two years. The material facts are set forth in the opinion delivered by Justice SUTHERLAND. The special term rendered a judgment directing the foreclosure of the mortgage, and the sale of the mortgaged premises, and against Philbrook for any deficiency.

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Carpenter & Beach, for the appellant.

R. H. Huntley, for the respondent.

SUTHERLAND, P. J. The bond and mortgage were executed by Philbrook to the Butterworths. Philbrook and wife conveyed the mortgaged premises to Douglass, subject to the mortgage, Douglass assuming and covenanting with Philbrook to pay the mortgage as a portion of the purchase or consideration money, for such conveyance to Douglass. Douglass afterwards and previous to the 26th day of July, 1859, *paid the mortgage to the mortgagees*. Satisfaction of the mortgage was not acknowledged, and no satisfaction-piece given. Afterwards, and on the 26th day of July, 1859, the bond and mortgage were delivered by the mortgagees to Douglass, together with an assignment, executed by the mortgagees, without the name of any person therein as assignee, a blank having been left for the name of the assignee. Afterwards, and on the 30th day of July, 1859, Douglass delivered the bond and mortgage and assignment, to Kellogg & Parker, as collateral security for his stock note for \$1500, which he at the same time delivered to Kellogg & Parker, receiving from them at the same time his protested draft for \$1500, then held by Kellogg & Parker. Afterwards, and on the 30th day of August, 1859, the name of the plaintiff was inserted in the blank left in the assignment, and the same, together with the bond and mortgage, re-delivered to the plaintiff in trust for the firm of Kellogg & Parker, of which he was a member, Douglass receiving therefor his stock note for \$1500, and the firm cancelling debts and evidences of debt the firm held against him for the remainder of the amount nominally or apparently due on said bond and mortgage, being \$2711.27, and on the same day (30th of August) the assignment was duly recorded. Afterwards, and on the 8th day of September, 1859, Douglass, by a deed, conveyed the mortgaged premises to the defendant, Oakes Ames, in fee;

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the deed stating on its face that the consideration for such conveyance was \$8000.

These facts were found by the judge who tried the action at special term, and most of them appear to have been conceded on the trial, and were conceded on the argument before us, particularly the fact that Douglass *paid* the bond and mortgage to the mortgagees, before any part of the transaction between Douglass and the plaintiff, or the firm of which he was a member, relative to the bond and mortgage.

The judge did not find as a fact, and there was no evidence tending to show, that Ames, on the conveyance to him, assumed or undertook in any form to pay the mortgage, as part of the consideration or purchase money for such conveyance, or that the amount nominally or apparently due on the mortgage was deducted from such consideration or purchase money, or in any other way allowed to Ames on account thereof. The deed to Ames did not show on its face that the conveyance was made subject to the mortgage; on the contrary, it contained a full covenant against all incumbrances.

In addition to the facts above stated, as found by the judge at special term, and which were either conceded, or conclusively established by the evidence, the judge found certain other facts, which no doubt influenced his judgment, but which I do not deem of any material, perhaps I should say, of *any* importance, even if properly found, and authorized by the evidence.

He found, that Douglass "represented to the firm of Kellogg & Parker, (the plaintiff and his partner,) before and at the time they purchased the mortgage of him, that it was a valid and subsisting security; and that they believed it was, until after they took and paid for it as aforesaid, and had the assignment to them recorded; and that they bought and took said mortgage in good faith, and fairly paid therefor."

It may be that the plaintiff's firm should be considered as holders for value, for although they took the mortgage on account of precedent debts of Douglass, yet the evidence

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tends to show that they delivered up certain securities or evidences of such debts; but I do not think that the finding, that the firm bought and took the mortgage in *good faith*, was authorized by the evidence. Parker, one of the firm, and who filled in the name of the plaintiff in the blank left in the assignment, swore that before doing so he consulted counsel on the question of merger; that he had been told by one counsel that it was a merger, and was told by him that he would not lend a dollar on it; and that he then consulted other counsel, as to "whether the title being in Douglass, and the mortgage being held by him, the mortgage would be merged;" that after consulting with other counsel, "he wrote in the name." He had no right to suppose that Douglass could have got the mortgage without paying the mortgagees; that there was any room for the question of merger, unless Douglass had paid the mortgage. The evidence shows that Douglass was insolvent, and that the plaintiff's firm took the mortgage for the purpose of securing their debt, or a portion of it, under circumstances and with a knowledge of facts, from which they ought to have inferred that the mortgage had been paid.

But assume that the judge was right in finding that the plaintiff's firm took the mortgage in good faith, if the mortgage was dead, had been extinguished by payment, neither their innocence, nor Douglass' fraud, would resuscitate it; and as bonds and mortgages are not negotiable instruments, like notes and bills of exchange, I cannot see that the finding is of the least importance.

As to the finding, that Douglass represented the mortgage to be a valid and subsisting security, it is certainly doubtful from the evidence whether the representations amounted to any thing more than the expression of an opinion; but if otherwise, Parker's own evidence, which has been referred to, shows that his firm did not rely upon such representations. Concede however that that finding was strictly authorized, and that the plaintiff's firm were induced solely by the rep-

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representations to take the mortgage, if it had been destroyed by payment, these representations did not make it valid, nor did they estop either Ames or Philbrook; and I do not see upon what principle evidence of such representations was admissible, as against Ames or Philbrook.

The judge also found as a fact, that when Douglass paid the mortgage, and also when he sold it to Kellogg & Parker, he elected and intended that the same should not be merged in the superior title, but should be kept alive as a valid and subsisting security.

It is perfectly clear that this finding is wholly immaterial. The law says, payment is satisfaction; and Douglass could not *thwart* the law, or the legal result of his own act, by any election or intention of his.

The judge further found as facts, that Ames took the deed with notice from and by the record, that the mortgage had not been canceled or discharged of record; and that before the deed was delivered, he had actual notice of the existence of the bond and mortgage. Of course the judge did not mean, by this finding, that Ames took the deed with notice of the existence of the bond and mortgage as valid instruments or securities for the payment of money. Whether they were or not, was the very question of law in the case.

I infer from Ames' answer and the evidence, that he knew all about the mortgage when he took the deed; that he knew that it had been paid, and that he had been informed of, and probably had consulted his counsel on, the legal question of merger; and that he took the deed at the peril and risk of being able to defend against the mortgage, as the plaintiff's firm took the mortgage at the peril and risk of being able to enforce it. But I do not see how this knowledge of Ames as to the mortgage and the question about it affects the question of its vitality after payment, or aids the plaintiff in trying to enforce it. Ames had a right to take the chances of being able to defend against the mortgage; and if its lien

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had been extinguished by payment, certainly his taking the deed with the notice found by the judge, would not revive it.

I have referred to all the findings of fact by the judge at special term.

There is no necessity, if there is a place, for the doctrine of merger. The controlling fact is, that the mortgage debt was *paid* by Douglass, the owner of the fee, who had assumed to pay it, and had expressly covenanted with Philbrook to pay it, and had been allowed the amount thereof, on account of the consideration to be paid by him for Philbrook's deed. The mortgage debt was primarily Douglass' debt to pay; and I think the payment by him was satisfaction, and extinguished the lien and vitality of the mortgage as entirely as payment by Philbrook, the mortgagor, would have extinguished them. Indeed, if it were necessary to take that view of the question, Douglass may be considered as having received the money from Philbrook to pay the mortgage, and as having paid it for Philbrook, or as his agent. It is plain, then, that the payment by Douglass extinguished the mortgage debt, and the lien and vitality of the mortgage, whatever may have been the intention of Douglass and the mortgagees; and, to use substantially the language of Judge Selden in *Harbeck v. Vanderbilt*, (20 N. Y. Rep. 398,) that it was not in their power, by any arrangement between them, to keep the mortgage alive for the benefit of the party making the payment. If then the mortgagees, upon payment by Douglass, had assigned the mortgage to him, the assignment would have been void, except that possibly a court of equity might have sustained it, for the purpose of protecting or perfecting his title to the mortgaged premises, or for some other equitable purpose, when it could be used for the benefit of Douglass or his grantees, without injury to third parties. The assignment certainly would have been absolutely void for the purpose of enabling Douglass to keep the bond and mortgage alive as money securities, for any such purpose as Douglass

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used them or undertook to transfer them to the plaintiff or his firm.

In *Kortright v. Cady*, (21 *N. Y. Rep.* 343,) it was held that a tender of the money due on a mortgage discharged the lien, though made after the law day. (*See also Champney v. Coope*, 34 *Barb.* 539; *Mead v. York*, 2 *Seld.* 449; *Stoddard v. Hart*, 23 *N. Y. Rep.* 557.)

But the instrument in the form of an assignment, delivered with the bond and mortgage to Douglass, had in it then the name of no person as assignee; and there is no evidence, or finding, that the mortgagees authorized the name of the plaintiff to be inserted in the blank left in the assignment. If the bond and mortgage had not been extinguished by payment, I do not see how the plaintiff could make title to them through the assignment. I do not see why the doctrine decided in *Chauncey v. Arnold* (24 *N. Y. Rep.* 330) does not apply to the assignment. But it is clearly unnecessary to examine or decide that question in this case.

The conclusion of law of the judge at special term, that the mortgage was a valid and subsisting security, and the decree of foreclosure and sale, and against Philbrook for any deficiency, were clearly erroneous, on the ground that the mortgage had been paid by Douglass. Although Philbrook did not defend, yet I do not see upon what principle a decree could be made against him for a deficiency, particularly in favor of the plaintiff, or his firm, who took the bond and mortgage, on the chances of a lawsuit.

As the defendant Ames asked in his answer for the affirmative relief that the bond and mortgage be delivered up to him, and the plaintiff put in a reply to this answer, and the parties interested were all before the court, I do not see why he was not entitled to it.

Although I do not see how the plaintiff can possibly succeed on a second trial, yet I doubt whether it would be regular for the general term to render the proper judgment in the case without granting a new trial.

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My conclusion is, therefore, that the judgment of the special term should be reversed, and a new trial ordered, with costs to abide the event.

BARNARD, J. concurred.

LEONARD, J. (dissenting.) When Douglass re-issued the mortgage he owned the premises affected with the lien thereof, in fee, and had the power as well as right to create any charge or incumbrance thereon which he thought proper. There is no one before us who had, at that time, any right to object to the mortgage being kept outstanding, except the mortgagor, and he makes no objection to it, and asks for no relief in respect to it, and his interest relates only to his personal liability and not to the land. Douglass could, at his pleasure, insist that the payment by him operated as a merger, but no one besides had the right or the interest in the premises to make such claim. The re-issuing of the mortgage by the insertion of the name of the plaintiff in the assignment thereof, and its delivery with the mortgage to him, created or continued the lawful lien of the mortgage upon the land to the extent of the consideration paid by the plaintiff, or by the firm of which he was a member. No one was affected injuriously by the mortgage except the very person who owned the land and continued the mortgage in full operation. Whether the liability of the bondsman was continued, it is not now necessary to inquire, as he has raised no question in that respect, although it may be conceded that there is nothing appearing which would authorize any judgment against him personally. That concession, however, in no way affects the right of the plaintiff to exhaust the security afforded by the pledge of the land.

The rights and equities of the appellant Ames are the only remaining subject to be considered. The mortgage and assignment were duly recorded, and that was constructive notice to him of their existence and that the plaintiff had some

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equities which were entitled to consideration. But that was not the only notice which the appellant had that the mortgage was outstanding, and that the plaintiff claimed to hold it as a valid and subsisting security against the property. When he purchased the premises he had *actual knowledge* of all these facts. As against Douglass no one can doubt the right of the plaintiff to foreclose and sell the mortgaged premises. How then can the plaintiff's right be cut off by one who knew of the existence of that right at the time he made his purchase? We have no evidence of the actual value of the mortgaged premises. The value may or may not be double the sum paid by the appellant and expressed as the consideration in the conveyance to him. It must be assumed that he knew the hazard of his attempt, and arranged the price to be paid for the land accordingly. He made the purchase upon the hazard that he could by litigation defeat the lien of the mortgage. It is absurd to reason about the rights or equities of such a party.

The judgment is right and should be affirmed with costs.

New trial granted.

[NEW YORK GENERAL TERM, November 2, 1863. *Sutherland, Leonard and Barnard*, Justices.]

CLINTON *vs.* J. S. & W. BROWN.

By a written contract between the parties, for the purchase by the defendants of a quantity of first sort hops, from the plaintiff, the hops were to be inspected and branded by S. and delivered in New York on or before the 20th of November, 1860, and paid for by draft on the defendants, at thirty days, &c. The hops were in fact inspected by S. and pronounced by him to be of the first sort, but were not branded as such by him. On the plaintiff's agent offering to telegraph to S. for permission to put his brand on the bales, one of the defendants said that they (the defendants) would not require it, or that it would make no difference. *Held* that the referee was

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right in holding as matter of law, that the defendants were estopped from insisting upon the omission to brand the hops, as a defense to an action for the price.

Held, also, that the written contract having made the inspection and determination of S. conclusive upon the parties, as to the quality or grade of the hops, the defendants could not be allowed to show, in such action, that the hops, when inspected by him, were of a quality inferior to that specified in the agreement.

A PPEAL from a judgment entered on the report of a referee. The action was brought to recover the contract price of one hundred and fifty bales of hops, under a written contract signed by the defendants, in these words:

"In consideration of the sum of one dollar, the receipt of which is hereby acknowledged, we have this day bought of William M. Clinton, of the town of Hartwick, Otsego county, one hundred and fifty bales of first sort New York state hops, said hops being a lot of hops of which he has the refusal of Roger Bamber, until the 15th of November next. In case the quantity of which he has the refusal should fall short of 150 bales, Mr. Clinton agrees to make up the quantity short of that amount, or if it runs over he agrees to deduct the same if required; said hops to be inspected by John F. Scott, Esq.; and all the hops said Scott inspects and brands first sort to be paid for at the rate of twenty-nine cents per pound, and all that he inspects prime to be paid for at the rate of thirty-one cents per pound; said hops to be delivered in the city of New York, on or before the 20th day of November next, and paid for by draft upon us at thirty days, or other satisfactory payment; said hops to be of the growth of 1860.

New York, October 25th, 1860."

A counterpart of this agreement, signed by the plaintiff, was set out in the answer, as follows:

"In consideration of the sum of one dollar, the receipt of which is hereby acknowledged, I have this day sold J. S. & W. Brown, (the defendants) of this city, one hundred and fifty bales of first sort New York state hops, said hops being a lot of hops, of which I have the refusal of Roger Bamber,

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until the 15th of November next. In case the quantity of which I have the refusal should fall short of one hundred and fifty bales, I agree to make up the quantity short of that amount, or if it runs over, I agree to deduct the same if required; said hops to be inspected by John F. Scott, Esq. and all the hops said Scott inspects and brands first sort, to be paid for at the rate of twenty-nine cents per pound, and all he inspects prime, to be paid for at the rate of thirty-one cents per pound, said hops to be delivered in the city of New York on or before the 20th of November next, and paid for by draft upon them for thirty days, or other satisfactory payment; said hops to be of the growth of 1860.

New York, October 25th, 1860."

The defendants admitted the making of the contract, but averred, as a defense, amongst other things, that the hops delivered in New York by the plaintiff, in pretended fulfillment of the contract, were not branded by the inspector named therein, nor inspected by him; and that they were not first sort hops in fact, and that the defendants never accepted, and refused to receive the hops under the contract.

The referee reported in favor of the plaintiff for \$9758.69.

William M. Evarts, for the appellants.

Levi S. Chatfield, for the respondent.

By the Court, SUTHERLAND, P. J. By the written contract, the hops were to be inspected and branded by John F. Scott, and delivered in the city of New York, on or before the 20th November, 1860, and paid for by draft on the defendants at thirty days, or other satisfactory payment made. The hops were in fact inspected and pronounced by John F. Scott to be first sort, but were not branded as such by him. This was alleged in the complaint, can hardly be said to have been denied by the answer, appears to have been conceded on the trial, and was found by the referee. Whether the conversation between C. W. Buel and John S. Brown, about

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telegraphing to Scott for permission to put his brand on the hops, took place on the 20th of November, the last day for the delivery of the hops by the written contract, or subsequently, on the 21st or 22d; and whether such conversation was as stated by C. W. Buel and L. P. Perkins, the plaintiff's witnesses, or as stated by the defendant Brown, and two or three others, were questions of fact, as to which the evidence was conflicting. The evidence of one of the defendants' witnesses, Smith, tended strongly to support the evidence of Buel and Perkins. The referee found as a fact, that on the 20th of November, about 11 A. M. the plaintiff's agent (C. W. Buel) on his attention being called to the provision of the contract requiring the hops to be branded by Scott, offered to telegraph for permission to put the brand on, there being telegraphic communication between New York city, where the offer was made, and Cooperstown, where the inspector resided, and that the defendant John S. Brown, to prevent his doing so, stated, in substance, that they (the defendants) would not require it, or that it would make no difference, and thus prevented their being branded. This finding by the referee must be deemed conclusive between the parties, as to the questions of fact above stated.

Having found on these questions of fact against the defendants, I think the referee was clearly right in holding as matter of law, that the defendants were estopped from insisting upon the omission to brand, as a defense. It is to be presumed that if the defendant Brown had not waived the branding, Buel might and would have telegraphed as he proposed, and that he would probably have obtained Scott's authority to brand. He must be supposed to know enough of telegraphic operations to authorize us to presume, if Brown had insisted upon the branding, that Buel might by telegraph have obtained Scott's permission to brand, in time to have branded the hops, and to have delivered them branded, on the 20th of November, according to the contract.

I think the evidence offered by the defendants, to show

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that the hops, when they arrived in New York, and on the 20th day of November, 1860, when offered to the defendants, had been injured by heating, and were of inferior quality to first sort, and worth less, was properly excluded by the referee. The offer was not to show that the hops had been injured by heating or otherwise, after they had been inspected by Scott and passed by him as first sort. It was not pretended that the bales had been opened and the hops examined after they arrived in New York. The inference from the evidence is, that when the conversation between Buel and Brown as to the hops not being branded &c. took place in New York, the bales had not been opened, or the hops examined there. The whole case shows that the only ground upon which the defendants declined receiving the hops and paying for them was, that they had not been branded, as required by the contract. It is plain that the referee and the counsel for the plaintiff understood and had a right to understand, the offer of the defendants to show the inferior quality of the hops, as substantially an offer to show that the hops, when inspected by Scott, were of a quality inferior to first sort. The witness Dunkle, by whom the defendants offered to show this, resided in Schoharie county, was a farmer, and it was not pretended that he had seen the hops after they were inspected by Scott.

As to the quality or grade of the hops when inspected by Scott, the written contract made his inspection and determination conclusive upon the parties. I think the referee was right in holding the contract price to be the rule of damages.

The defendants actually received the hops into their store, and had them at the time of the trial, if they had not disposed of them.

Having examined all the material grounds urged on the part of the defendants for a reversal of the judgment and a new trial, I am of the opinion that the judgment should be affirmed with costs.

[NEW YORK GENERAL TERM, November 2, 1863. *Sutherland, Leonard and Bernard, Justices.*]

THE MAYOR &C. OF THE CITY OF NEW YORK *vs.* THE
BROOKLYN FIRE INSURANCE COMPANY.

A lease, executed by the mayor &c. of New York to B. and others was upon the condition that the lessees should erect on the demised premises such a building as was described in a certain petition and resolution; and at the expiration of the term quit and surrender the premises in as good state and condition as reasonable use and wear thereof would permit. The rent reserved was nominal only. *Held* that the future ownership by the lessors, of the building to be erected by the lessees, was in the contemplation of the parties at the time the lease was executed; and that at the expiration of the term the lessors became the owners of the superstructure which had been erected in pursuance of the conditions of the lease, and had an insurable interest therein.

Held, also, that the lessors having been in possession of the building erected by the lessees, under a claim of ownership, at the time of procuring an insurance by them upon the same, the insurers could not be allowed, in an action on the policy, to dispute the lessors' interest in the building; even if the title was acquired by an act constituting a trespass as against the lessees, or their receiver.

Verbal statements, made by the agent who effects an insurance for the owner of the property, in respect to the future occupation of the building, are not admissible in evidence, in an action upon the policy, inasmuch as such evidence would tend to vary the operation and effect of the language contained in the policy.

If there is any warranty as to the future use or occupation of the property insured, it must be contained in the policy, or be reduced to writing in proper form, before it can be admitted to affect the construction or obligation of the policy.

Where the property described in a policy, and the purposes to which it is dedicated, sufficiently indicate the character and nature of the articles to be kept there, and the business to be transacted, and the nature and extent of the risk must have been known to the insurers to embrace articles and pursuits specified as hazardous, extra-hazardous and special hazards, the carrying on of a business, in the building, denominated hazardous or extra-hazardous or specified in the memorandum of special rates, without permission of the insurers, will not vitiate the policy.

ON the 23d June, 1858, the defendants issued a policy for \$5000 to the plaintiffs on the Crystal Palace Building, "together with the furniture and fixtures now in said building lately owned by the association for the exhibition of the industry of all nations, and since vested in John H. White,

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as receiver, and also such other property lately vested in said White's hands, as receiver, belonging to exhibitors, and lately in said White's custody and keeping now remaining in said building." The insurance was "for account of whom it may concern," and was against loss or damage by fire, and for one year. On the 15th of December, 1854, John H. White was appointed by the supreme court "receiver of the property and effects" of the association, under the statute in regard to voluntary dissolution of corporations, and with authority to sell the property and effects at public or private sale. From the 15th of December, 1854, to the 31st of May, 1858, White, as receiver, was in possession of the building, and such of the furniture, fixtures and other property as the respective owners had not called for. During that time he frequently let the building for purposes of different kinds, and occasionally delivered to the respective owners different articles of the property which had come into his hands. The land on which the building had been erected had been occupied by the association under a lease from the plaintiffs, which expired on the 3d January, 1857. The plaintiffs allowed White, as receiver, to hold over until the 31st of May, 1858, when they took possession by force, without even the form of law, and turned White out; such possession and eviction, including as well furniture, fixtures and other property, as the building. Two days after the insurance was effected in this case, and on the 25th June, 1858, the plaintiffs let to the American Institute, for one year from the 1st June, 1858, the land on which the palace stood. And in the lease reserved permission to retain there all the goods and chattels then in the building, and the American Institute covenanted that they should be kept safe and in good condition. The American Institute, immediately on receiving the lease, took possession of all the property as White had had it; and on the 15th September, 1858, opened their annual fair in the building. On the 5th day of October ensuing the building and its contents were destroyed by fire. The plaintiffs claimed only for a loss on

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the building. It was proved on the trial that the land was unoccupied when the lease was given by the plaintiffs on the 23d March, 1852, for the purpose of an industrial exhibition for five years, and that the building covered by the insurance was erected by and was the property of the "Association for the exhibition of the industry of all nations," who were assignees of the plaintiffs' lessee. It was also proved, that the "furniture and fixtures in the building" belonged to said association, and "the other property" in the building, at the time of the insurance, belonged to various exhibitors. It was also proved, that the American Institute, for the purposes of its exhibition, had introduced into the insured premises many articles, which in the conditions annexed to the policy were denominated hazardous, extra-hazardous, and special hazards, such as glass-blowing, restaurants for sale of liquors and cigars, with kitchen for cooking, acids, forge for repairing, burning fluid, gas manufacturing, steam engines, a panorama, &c., &c.; all of which articles were not in the building when the policy was executed, but were in it when the fire occurred, and had been for about a month. It was also proved that during the previous year, while the premises were in the possession of White, as receiver, they had been let to the American Institute, who had held in it their annual fair for 1857, but their lease had expired, and he had refused to let it to them for 1858; and that thereupon the city had forcibly dispossessed him, and that no permission had been granted to the American Institute to hold there its annual fair for 1858, until after this insurance had been effected; and that no consent thereto had been asked for or obtained from the insurers. The defendants offered to prove representations made by the agent of the plaintiffs when he applied for and obtained this insurance, but the court excluded the evidence. The defendants made several requests to charge the jury, with which the court refused to comply, and to which refusals the defendants excepted. The justice, presiding at the cir-

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cuit, directed the jury to find a verdict for the plaintiffs, and they did so for the amount of the insurance and interest.

Exceptions were taken on the trial, which were ordered to be heard in the first instance at the general term.

D. Lord and T. H. Rodman, for the plaintiff.

J. W. Edmonds and D. E. Wheeler, for the defendants.

By the Court, LEONARD, J. The lease from the mayor &c. of New York to Edward Riddle and his associates, was upon the condition that he and his associates should erect on the demised premises such a building as was described in a certain petition and resolution, and at the expiration of the term, quit and surrender the premises in as good state and condition as reasonable use and wear thereof would permit. The rent reserved was nominal only. The terms of this covenant operated as a grant of the superstructure so to be erected, to take effect at the expiration of the term. The building was to be the consideration, in part, for the lease. Without securing the construction and ownership of the edifice at the end of the term there was no apparent object to be attained by the covenant of the lessee to build. We think the future ownership of the building was in the contemplation of the parties at the time of its execution, and that, at the expiration of the term the plaintiffs became the owners of the superstructure erected in pursuance of the condition of the lease, a compliance with which alone rendered it operative in favor of the grantee.

If the building were to be considered as the property of the lessee at the termination of the lease, the plaintiffs were liable to be charged for its value as wrongdoers, at the suit of the receiver, after they had forcibly ejected him and taken possession thereof. The plaintiffs were then in possession under a claim of the ownership of the building, and it is a question which the defendants are not called upon to vindicate.

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cate, how the plaintiffs acquired the title, or whether they were liable to be dispossessed or to be charged as wrongdoers. The defendants cannot be allowed to dispute the plaintiffs' interest in the building, even if the title was acquired by an act which constitutes a trespass as against the lessee or the receiver. The receiver can maintain no action to recover the actual possession of the building since its destruction, and a recovery against the plaintiffs for its value, by way of damages, would vest the ownership in them, even if they acquired no title in it by the conditions of the lease, and the expiration of the term. The questions sought to be raised by the defendants based on the manner by which the plaintiffs acquired title are not open to the defendants, and the authorities cited on this subject are not applicable here. The cases are between landlord and tenant and others standing in a representative relation, which is not the situation of the defendants here.

It may be observed that no action has been prosecuted by the receiver to recover the possession of the building, so far as is shown by the case.

There is no doubt that the plaintiffs had an insurable interest in the building as against these defendants. The exceptions taken in respect to the interest of the plaintiffs in the subject insured, are therefore not well taken.

It is insisted that the building was occupied and used for certain purposes, and contained goods, wares and merchandise, within the schedules attached to the policy, specifying forbidden occupations and articles, denominated hazardous, extra-hazardous, and special hazards, and that the body of the policy contains no language that permits such occupations to be carried on, or such articles to be kept. The policy describes the building as the Crystal Palace; and mentions that it contains the furniture and fixtures lately owned by the association for the exhibition of the industry of all nations, and also the property of exhibitors remaining in the building. The premises had been used and occupied as a place of exhibi-

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tion for "The World's Fair," as it was called, and also for the annual fair of the American Institute, for several years prior to the execution of the policy of insurance, and the nature of the prior occupation was well known to the defendants. There was no "fair" on exhibition at that time, but the annual "fair" of the American Institute was opened at the building in September following, and numerous articles and manufactures, and also a restaurant, within the restrictions mentioned in the schedules attached to the policy were kept and carried on there until the fire which destroyed the building.

There were numerous articles contained in these schedules which were in the building at the time the policy was executed, and had been on exhibition at that place, and belonged to exhibitors, or to the receiver of the association for the exhibition of the industry of all nations.

The policy describes the building and the general nature of its contents, and the purpose of its occupation. Nothing can be found leading to the inference that the building was not to be occupied and used as it had been before, and that such articles as had been on exhibition, and such manufactures and occupations as had been carried on there were not to be again used, exhibited and carried on.

The property described in the policy, and the purposes to which the building was dedicated, sufficiently indicate the character and nature of the articles to be kept there and the business to be transacted. The nature and extent of the risk must have been known to the insurers to embrace articles and pursuits within the schedules referred to, which were annexed to the policy.

The refusal of the justice at the trial to give the instructions asked for in respect to the manner of the use of the building or the nature of the articles kept therein, was correct, and the exceptions of the defendant's counsel to such refusal were not well taken.

The defendants also offered to give evidence of the verbal statements of the agent of the plaintiffs who effected the

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insurance, in respect to the future occupation of the building, but it was excluded, and to this ruling the defendants excepted. Such evidence would tend to vary the operation and effect of the language contained in the policy. If there was any warranty as to the future use or occupation of the property it must be contained in the policy, or be reduced to writing in proper form, before it can be admitted to affect its construction or obligation. Such a statement is not, in legal sense, a representation of any fact. There was no fact in existence about which the statement proposed to be given in evidence was offered. The ruling of the justice on this question was correct.

The judgment was suspended at the trial by order of the justice, and the exceptions were directed to be heard at the general term in the first instance.

Judgment should now be entered for the plaintiffs on the verdict, with costs.

[NEW YORK GENERAL TERM, February 1, 1864. *Leonard, Sutherland and Clarke, Justices.*]

In the matter of the estate of ABRAHAM G. THOMPSON, deceased, on the appeal of Edward G. Thompson, his administrator, &c.

A recovery in the supreme court, against an administrator, after a trial at law on the merits, for services rendered by the plaintiff as proctor and counsel for the administrator, in the administration of the estate, adjudges that such services constituted actual, necessary, just and reasonable expenses of the administration, which must be borne by the estate. And the surrogate has power to order the administrator to pay the amount of the judgment, although there are not sufficient assets to pay the same and all the debts of the intestate which constitute claims against his estate, in full. SUTHERLAND, J. dissented.

The surrogate has the same power to direct that an execution be issued upon a judgment recovered against an administrator for liabilities incurred by

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him in the administration of the estate, as he has to order such process to issue upon a judgment recovered for a debt owing by the deceased. And it is his duty so to order, if the creditor shall require it.

THIS is an appeal by Edward G. Thompson, administrator with the will annexed of Abraham G. Thompson, deceased, from an order made by the surrogate of the county of New York, on the 31st of January, 1863, ordering said administrator to pay to Edward P. Cowles \$2000, with interest from February 27, 1862, and \$25 costs. Cowles recovered a judgment February 27, 1862, in the supreme court, against Edward G. Thompson as such administrator, for \$2000. The judgment not being paid, Cowles applied to the surrogate by petition, and obtained from him an order or citation requiring said administrator to render an account of his proceedings as such, and show cause why he should not be ordered to pay the judgment, or why an execution should not be issued upon it to collect the amount due upon it, and why he should not render an account of his acts and doings, and of the moneys in his hands. The account was rendered. By it, it appeared that the administrator had in his hands sufficient assets to pay the judgment of Cowles in full, but that he had not sufficient assets to pay it in full if the moneys in his hands were to be divided up *pro rata* among all the creditors of the estate. The surrogate, by his order made January 31, 1863, ordered the administrator to pay the judgment in full, viz. \$2000, with interest from February 27, 1862, and \$25 costs of the proceedings before the surrogate. Abraham G. Thompson died October 29, 1851. Henry Sheldon became sole executor of his will. Mr. Cowles performed professional services as an attorney and counsellor at law for Sheldon in his capacity as executor, and for the benefit of the estate which he represented, during 1857, 1858, and 1859. Sheldon died December 19, 1859. The present administrator with the will annexed was appointed April 20, 1860. Cowles subsequently brought suit against the present administrator with the will annexed, and recovered the judgment be-

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fore mentioned. The prayer of the petition to the surrogate was in the alternative, namely, that the administrator be ordered to pay the judgment from the funds in his hands belonging to the estate, or that an execution issue on the judgment to collect its amount. The surrogate did not direct an execution to issue on the judgment, but made a direct order that the administrator pay to Cowles the amount of the judgment. The decision of the surrogate, as appears by his opinion, proceeded upon the ground that § 58 of art. 3, tit. 3, chap. 6, part 2, of the Revised Statutes as amended by chap. 160 of the Laws of 1849, provides that in all cases such allowance shall be made to executors and administrators on the settlement of their accounts, "for their actual and necessary expenses as shall appear just and reasonable," and that, in the present case, the supreme court had declared, by the judgment in favor of Cowles, that \$2000 was a just and reasonable allowance for the actual and necessary expense of counsel fees, and that that amount was due to Cowles by the estate. This being so, he decided that the remedy of Cowles was a decree by the surrogate that the administrator pay the amount of the judgment out of the estate, with interest and costs, upon which decree an execution could issue.

Blatchford, Seward & Griswold, for the appellant. I. The only authority to be found in the statute for the application made to the surrogate by Mr. Cowles, is found in 2 *R. S.* 116, §§ 19, 20. Those sections are as follows:

"§ 19. Where a creditor shall have obtained a judgment against any executor or administrator, after a trial at law upon the merits, he may at any time thereafter apply to the surrogate having jurisdiction, for an order against such executor or administrator, to show cause why an execution on such judgment should not be issued.

§ 20. The surrogate to whom such application may be made, shall issue a citation, requiring the executor or administrator complained of, at a certain time and place therein to

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be named, to appear and account before him; and if, upon such accounting, it shall appear that there are assets in the hands of such executor or administrator, properly applicable under the provisions of this chapter to the payment, in whole or in part, of the judgment so obtained, the surrogate shall make an order, that execution be issued for the amount so applicable."

It appearing by the account rendered by the administrator that he has in his hands assets sufficient to pay the amount of Cowles' judgment, the questions arise, (1.) Whether the surrogate has any jurisdiction or authority whatever to make any order for the issuing of an execution in the premises, or any order for the payment of any amount whatever; and (2.) Whether, if he has such authority, Cowles is entitled to have that judgment paid *in full* out of such assets, or whether such judgment is only to be paid *pro rata* with the other debts against the estate, it appearing by the account that the assets of the estate are insufficient to pay in full all the debts against the estate.

Ordinarily it is a matter of no consequence to an administrator whether all the debts against the estate he administers be paid *pro rata*, or whether one of such debts be paid in full and the rest of them *pro rata*; and, ordinarily, all the interest the administrator has in any such question is, that he be protected by a proper order of the surrogate in paying any creditor in full to the exclusion of others. In the present case, however, the administrator of Abraham G. Thompson has a personal interest in the question. He is also administrator with the will annexed of his father, Edward G. Thompson, and a beneficiary under his will.

The language of section 20 of the statute, before referred to, is this: "If, upon such accounting, it shall appear that there are assets in the hands of such executor or administrator, properly applicable under the provisions of this chapter to the payment, in whole or in part, of the judgment so obtained, the surrogate shall make an order that execution be

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issued for the amount so applicable." This is the sole authority for any action of the surrogate in the premises. He has no power, other than what is conferred upon him by this section 20, to order the issuing of an execution in the premises, or to order the payment of Cowles' judgment. And he can only issue such an execution, provided the assets in the administrator's hands are properly applicable under the provisions of chap. 6, part 2, of the revised statutes, to the payment, in whole or in part, of the judgment in question. If he has no authority to issue an execution in a case like the present one, *a fortiori* he cannot order the judgment to be paid by an order which, when docketed in the county clerk's office, becomes a decree on which an execution can issue. This is what he has done, while he impliedly admits that he could not issue an execution directly on Cowles' judgment. Now, search will be made in vain in such chapter 6 for any authority on the part of the administrator to pay this debt of Cowles in full, provided the assets of the estate of Abraham G. Thompson are insufficient to pay in full all the debts against him, or for any authority on the part of the surrogate to order the administrator to make such payment in full, or to issue any execution for any amount, much less for the full amount of Judge Cowles' debt. On the contrary, certain provisions in chapter 6 expressly forbid the payment of this debt of Cowles under the circumstances, in full or otherwise than pro rata with the other debts against the estate. It is provided as follows by 2 R. S. 87, §§ 27 and 28:

"§ 27. Every executor and administrator shall proceed with diligence to pay the debts of the deceased, and shall pay the same according to the following order of classes: 1. Debts entitled to a preference, under the laws of the United States; 2. Taxes assessed upon the estate of the deceased, previous to his death; 3. Judgments docketed, and decrees enrolled, *against the deceased*, according to the priority thereof, respectively; 4. All recognizances, bonds, sealed instruments, notes, bills, and unliquidated demands and accounts.

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§ 28. No preference shall be given, in the payment of any debt, over other debts of the same class, except those specified in the third class; nor shall a debt due and payable, be entitled to preference over debts not due; *nor shall the commencement of a suit for the recovery of any debt, or the obtaining a judgment thereon against the executor or administrator, entitle such debt to any preference over others of the same class.*"

The sections just quoted have reference solely to the payment of *the debts of the deceased*. In the present case the debt of Mr. Cowles was *not a debt of the deceased*. Moreover, under the provisions of the sections just quoted, it clearly appears that no judgments recovered for any debts of the deceased are entitled to be paid by an administrator in full, where there is a deficiency of assets to pay in full all the debts against the estate, *except judgments against the deceased*. Such judgments are to be paid in full and according to their priority in time of recovery; but they must be judgments for *debts of the deceased*. And section 28 contains an express direction that the obtaining a judgment against an administrator for *any* debt, shall not entitle such debt to any preference over others of the same class. But, as remarked before, sections 27 and 28 have reference solely to *debts of the deceased*, and *judgments for debts of the deceased*. Now, in the light of these §§ 27 and 28, (2 R. S. 87,) it is perfectly clear that where §§ 19 and 20, (*Id.* 116,) before quoted, speak of a judgment against an executor or administrator, they mean exclusively a judgment against him *for a debt of the deceased*, and not a judgment for a debt created wholly after the death of the deceased, and on the personal procurement of the executor or administrator. In the present case the services rendered by Mr. Cowles, for which he obtained his judgment, were services rendered by him, not on the retainer of the deceased, but wholly after the death of the deceased, and on the retainer of Henry Sheldon. Henry Sheldon was, to be sure, the executor of Abraham G. Thompson, and

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the services rendered by Mr. Cowles upon the retainer were, to be sure, rendered in respect of matters involving the estate of Abraham G. Thompson. But such services might as well have been rendered by Mr. Cowles, on the procurement and retainer of Henry Sheldon, in and about any other matter as well as in and about the estate of Abraham G. Thompson. The rendering of such services, under such circumstances, did not make the estate of Abraham G. Thompson in any manner liable to Mr. Cowles. It made Henry Sheldon individually liable to Mr. Cowles. If Mr. Cowles failed, during the lifetime of Henry Sheldon, to obtain payment from Henry Sheldon, he has his remedy against the executors of Henry Sheldon. The difficulty in the present case is, that sections 19 and 20 of 2 R. S. 116, which are the only sections under which the surrogate has any authority to act in the premises, have reference manifestly only to judgments against an administrator *for debts of the deceased*, because "*the provisions of this chapter*," referred to in section 20, have reference solely to *debts of deceased*, and to judgments against an administrator *for debts of the deceased*. This we have shown, by citing the language of 2 R. S. 87, §§ 27, 28. Moreover, all the provisions of article 2, title 3, of chapter 6, of part 2, of the Revised Statutes, which article relates to the duties of administrators in the payment of debts, and in which article §§ 27 and 28 are found, have reference solely to *debts of the deceased*. The surrogate seems to concur in the view we take to a certain extent, for he says, in his opinion, "In order to make the judgment a 'debt' against the estate, within the meaning of the statute, so that it must abate with the other debts due the estate in consequence of the deficiency of assets, it would be necessary that the services for which the judgment has been obtained, should have been rendered to the testator in his lifetime." But the surrogate then concludes by directing the judgment to be paid in full, forgetting that he has no authority to make such an order, unless the debt in question was a debt against the deceased in his lifetime—

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in other words, a debt "of the deceased," within the language of 2 *B. S.* 87, § 27.

II. The only other provisions in chapter 6 of part 2 of the Revised Statutes, which can be cited as having any bearing upon the question involved here, are section 54, article 3, title 3, chapter 6, part 2, (2 *B. S.* 92, § 54,) and the part before quoted from section 58 of the same article, (*Id.* 93, § 58). Section 54 is as follows: "§ 54. In rendering such account, every executor or administrator shall produce vouchers for all debts and legacies paid, and for all funeral charges and just necessary expenses, which vouchers shall be deposited and remain with the surrogate; and such executor or administrator may be examined on oath touching such payments, and also touching any property or effects of the deceased which have come to his hands, and the disposition thereof." Section 58 says that, in settling the accounts of executors and administrators, "such allowance shall be made for their actual and necessary expenses as shall appear just and reasonable." But these sections have no bearing on the question here. They mean only that an administrator, in rendering his account, shall produce vouchers for, and be allowed all the just, *actual*, and necessary expenses *which he has paid*. Now Edward G. Thompson certainly has not paid this claim of Mr. Cowles, nor could it be expected that he would pay that, or any other claim not incurred by himself. He pays the expenses which he himself incurs. For those expenses he is personally liable to the parties with whom he incurs them, even though he should fail to have them allowed in his accounts with the estate. And those parties must regard him as their debtor, and have no legal claim against the estate. So here, Cowles had for his debtor Henry Sheldon, and never had any legal claim against Edward G. Thompson individually, or against the estate of Abraham G. Thompson. He could have recovered the amount of his debt from Henry Sheldon individually, and have made Henry Sheldon pay it, even though Henry Sheldon should never have obtained its

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allowance as a credit in his accounts with the estate of Abraham G. Thompson. And Cowles' claim remains good against the estate of Henry Sheldon, and he has no claim against the estate of Abraham G. Thompson. The fact that Mr. Cowles has his judgment against Thompson, as administrator, is of no consequence. The only question is, whether that judgment is to be paid in full, and execution to be issued for its full amount, against the assets of the estate of Abraham G. Thompson. The theory on which the surrogate acted seems to have been that, as the payment of Cowles' judgment, if made in full by the administrator, would be allowed to him in his accounts with the estate, therefore, the surrogate had a right to, and ought to direct the judgment to be paid in full out of the funds of the estate. This is an assumption of power on the part of the surrogate. The statute confers no such authority upon him. He must find a warrant for his action in the statute, and cannot act upon general principles of equity. Besides, the authority granted to the surrogate by sections 54 and 58 of article 3, to make an allowance to executors and administrators, on the settlement of their accounts, for just, actual and necessary expenses, gives the surrogate no authority to issue an order compelling an administrator to *pay* such expenses as the surrogate may decide to be just, actual and necessary. The authority of the surrogate only extends to allow the administrator, in his accounts, such expenses *after he has paid them*.

The result of the whole matter is:

1st. The statute on which the application to the surrogate was founded has reference solely to *debts due by the deceased*.

2d. The surrogate has, under the statute, no jurisdiction whatever to order the payment in full of any judgment, except a judgment *for a debt due by the deceased*.

3d. Even if Mr. Cowles' debt were a debt due by the deceased, inasmuch as a judgment for it was not obtained

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against the deceased in his lifetime, a judgment for it against the administrator would not entitle it to a preference in payment where there is a deficiency in the assets of the estate to pay all its debts in full.

4th. The surrogate has no power to order an administrator to pay any amount as expenses of the estate. He can only allow the expenses, after they have been paid.

W. M. Evarts, for the respondent. The judgment recovered establishes, beyond dispute, on this application, or in any accounting, before the surrogate, two things: (1.) That the plaintiff is entitled for the services rendered and sued for, to the sum of \$2000. (2.) That this demand is to be collected out of the estate of Abraham G. Thompson, *according to law*.

The questions, then, of the amount of the plaintiff's claim, and that it is to be paid by the estate of Abraham G. Thompson, have been adjudicated by the supreme court, and are not open to consideration here. (*Le Roy v. Bayard*, 3 *Bradf.* 228.) The only subject of discussion then, is what is the plaintiff's legal method of enforcing his judgment? All the suggestions in the brief of the administrator's counsel, that the petitioner had a claim for the services rendered to Thompson's estate upon the retainer of Sheldon, as executor, against *Sheldon, personally*, should have been urged (as they probably were but without success,) in the suit in the supreme court. The administrator's view, as presented by his counsel, of the petitioner's means of enforcing his judgment, is, that he has *none whatever*. His proposition is, (1.) That the surrogate cannot allow execution to go on *this* judgment, because, he says, the sections of the statute attributing this power and duty to the surrogate make its exercise applicable only to judgments on debts of the decedent recovered against his representatives. (2.) That, though, *if* the administrator *paid* this judgment, the payment would be allowed to him as a payment of a charge upon the estate, yet, by refusing to pay it, he can defeat the creditor's right to the collection of his judgment, whether by

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decree of the surrogate, or by execution on the judgment. Before the system of our statutes giving the surrogate the ascertainment of assets, and their appropriation to and distribution among creditors of the estate (whether such creditors were of the decedent or of the executor or administrator in his representative capacity) a creditor obtained his judgment at law against the executor or administrator unless a defense of an entire or partial deficiency of assets was made *in the suit*, before this judgment and execution was issued against the property of the estate, and if no means to satisfy the execution from such property was found, a suit upon the judgment, alleging a *devastavit* was brought against the executor or administrator *personally*, and in this latter action the former judgment was *conclusive evidence* of the debt against the estate and of assets to pay it, and proof that the judgment was uncollectable from the estate was proof of the *devastavit*, and the creditor had judgment against the executor or administrator personally, and collected it from *his* property. (*Butler v. Hempstead's Adm'rs*, 18 *Wend.* 667.) By the effect, however, of the statutes regulating the accounting before surrogates, the pertinency and importance of the question of *assets* in suits against executors or administrators are ended, and the only issues are of the validity and amount of the creditor's claim. (*S. C.* 18 *Wend.* 667. *Fox v. Backenstose*, 12 *id.* 542.) Accordingly the statute provides that no "execution shall issue upon a judgment against an executor or administrator until an account of his administration shall have been rendered and settled, or unless on an order of the surrogate who appointed him. (2 *R. S.* 88, § 32.) This section manifestly makes the power and jurisdiction of the surrogate to relieve from the restraint on issuing execution co-extensive with the restraint itself, and upon the surrogate's ascertaining that the judgment presented to him judicially establishes a debt to be collected out of the estate. There is but one further question for his consideration, viz: Whether there are assets of the estate AGAINST WHICH the payment of

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the judgment by the executor or administrator would be a proper charge. If this be so, it is the *duty* of the executor or administrator to pay it, and the *right* of the judgment creditor to receive it. The surrogate then, necessarily, either allows execution peremptorily or orders the payment of the judgment by the executor or administrator within a period fixed, and execution *nisi*. If the surrogate's examination shows him that there are *no assets*, or that the payment of the judgment *pro rata* with some other liabilities of the estate, is the only duty of the executor or administrator, and the only right of the judgment creditor, then the surrogate refuses to allow execution, or allows it for the *pro rata* payment as it may be.

Now it appears, (1.) That this claim, both in respect to its validity and amount, has been conclusively established (by the judgment) as a charge against the estate and to be collected out of it, provided there are assets out of which it is entitled to be paid in full, and if not, in full to such extent as the assets against which it is chargeable will satisfy it. (2.) That it is of a *nature* which entitles it to be paid *in full*, as a charge upon the estate for its administration before *any* debts of the decedent can come upon the assets. (3.) It appears that there are assets sufficient to pay all this and all claims of the same nature in full, so that no question of *pro rata* among them arises. (4.) It is manifest (and is conceded by the argument of the counsel for the administrator) that *if* the administrator pays it, and *if* it is a valid claim in substance and in amount, it will be allowed him as an *expense* of the estate, and not be put on a *pro rata* footing with the debts of the decedent. Indeed the whole argument of the counsel rests upon the fact that it is *not* a debt of the decedent. But, as before said, the *judgment* establishes the claim as a valid one both in substance and amount; so that it stands thus: *If* the administrator pays it in full, it is a just charge against the assets of the estate in the administrator's account.

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But this result is the very thing, and the only thing, that needed to be demonstrated, viz: That there were assets which it was the *creditor's right* to have applied to the satisfaction of his claim. For no payment can be a proper charge upon the assets in the administrator's account in his favor, unless it was *rightly* made, and it could not be *rightly* made unless the creditor had a *right* to its payment.

It remains only to consider a technical construction of a subsequent section of the same chapter of the statutes, which the administrator's counsel raised as an objection to the jurisdiction of the surrogate in respect of an issue of execution on this judgment. The section (32, p. 38) already quoted, having restrained a creditor having judgment against an executor or administrator from issuing an execution thereon, but, by the surrogate's permission, subsequent sections of the same chapter provide the manner for the creditor's application, and the manner of the surrogate's exercise of his jurisdiction. (2 R. S. 116, §§ 19, 20.) Section 19 gives the right to *every* creditor having a judgment against an executor or administrator to apply to the surrogate for an order, &c. This shows that the right to apply for relief from the restraint on issuing execution is co-extensive with the restraint. It is not disputed that the petitioner comes within the privilege of *this* section. Section 20 provides for a citation of the executor or administrator, and an accounting in respect of assets, and proceeds as follows: "If upon such accounting it shall appear that there are assets in the hands of such executor or administrator, *properly applicable under the provisions of this chapter to the payment, in whole or in part, of the judgment so obtained*, the surrogate SHALL make an order that the execution be issued for the amount so applicable." The *chapter* thus referred to as the resort to determine whether an *application* of assets by the executor or administrator to the payment of the judgment would be *proper*, is entitled, "Of wills and testaments; of the distribution of the estates of intestates; and of the rights, powers and duties of executors

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and administrators." It includes, besides many other things within its purview, *all* matters which form the subject of accounting by an executor or administrator before the surrogate, whether those matters arise in the distribution of the estate, and the payment of the debts of a decedent, or in the care and management of the estate and the conduct of the administration. Accordingly, whenever there are assets whose *application* by the executor or administrator to a judgment against the estate would be *proper*, and so a *proper* allowance to an executor or administrator making the same, in his accountings under that chapter, it is manifest that the assets so applied were so "*properly applicable under the provisions of this chapter.*" For the application of the assets would not be allowed in the executor's or administrator's accounts, unless they were "properly applicable" in the manner they were applied; and if "*properly applicable*" in the manner they were applied, they must have been so applicable "under the provisions of this chapter;" for the chapter includes the whole regulation of "*the rights, powers and duties of executors and administrators.*" The administrator's counsel has found no case drawing or hinting at the novel distinction that only judgments for debts of *the decedent* are within the purview of the statute, when the statute itself applies the jurisdiction of the surrogate to "*a judgment against an executor or administrator.*" The plain purpose as well as language of the statute rejects any such distinction as insensible. This purpose is to suppress the competition between creditors for priority of judgment, and to remove from litigation in suits against executors and administrators the question of assets or no assets, and leave the enforcement of any judgments obtained out of assets to the ascertainment of assets or no assets before the surrogate. Manifestly, this purpose requires that *every* judgment *against* an executor or administrator should be dependent for its collection *only* on the question of the existence of assets out of which *it may lawfully be paid*. For if there are assets out of which it may lawfully be paid

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it must be collected *in invitum* if the executor or administrator refuses to make the payment. But the argument of counsel produces the absurd result of an absolute refusal of enforcement to a creditor's rights established by judgment in all cases where the judgment is for a charge on the estate for its administration. But the exercise of this jurisdiction on judgments against an executor or administrator, irrespective of whether it was for a debt of decedent or not, is familiar and unquestionable. (*Dudley v Griswold*, 2 *Bradf.* 24.) In that case the judgment was against the executor for costs, in a suit instituted by him. This was manifestly *not a debt of the testator*, but by the judgment it was to be collected out of the estate, and the surrogate allowed execution. No question came up as to collection in full or *pro rata*, as no suggestion of want of assets in any aspect was made. But no one will contend that any other rule will apply for the *enforcement* of a judgment, than for its voluntary payment by an executor or administrator. Whenever a payment in full by him is justifiably chargeable and allowable against an estate, then it must be enforced in full if he refuses the just voluntary payment. The counsel for the administrator thought it useful in his argument below to display to the court the peculiar position of his client in resisting the payment of this just and adjudicated charge against the administration of the estate. In substance, he says, the ordinary protection which a creditor has, that an executor or administrator on whose retainer professional services have been rendered to an estate, will pay for the services out of the estate, fails you, because Sheldon, who is dead, employed you, and I, his successor, have no notion to do justice from any fear of being obliged to pay from my own pocket, if the estate does not satisfy you. Besides, you cannot rely upon my doing my simple duty as a mere representative of the estate, because I am also a creditor of the decedent, and my *pro rata* share of the estate which your professional services protected and saved, will be dimin-

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ished by the estate's paying for those services. You cannot expect me to do my duty, as administrator, at the expense of my interest as a creditor. You cannot expect me to diminish the fund in which I participate, by paying therefrom the cost of acquiring or protecting it. It cannot be necessary to comment upon this peculiar position of the administrator farther than to say that it tends to explain much more than to justify the very ingenious effort to render this judgment uncollectable. If the administrator merely desires to have, in advance, the surrogate's allowance of this judgment as a just expense in the administration account, hereafter to be rendered, his defense is wholly unnecessary, for the judgment is his all-sufficient voucher for its payment. If he merely wishes an ascertainment that the estate is sufficient to pay all *expenses* of the administration of the estate in full, the defense was unnecessary, for the account produced by the administrator shows such sufficiency, and an extensive margin beyond. But if there was any technical objection to the allowance of an execution on the judgment, none can be made to the surrogate's direction of its payment by the administrator, and its allowance in his accounts. This jurisdiction is undisputed, and the debt being uncontested, and the state of assets clear, the surrogate's order for its payment was manifestly correct.

Upon the whole, then, the order appealed from should be affirmed; or, if the appellate court should consider that the surrogate's jurisdiction in the premises is more properly exercised by ordering an execution upon the judgment, the order appealed from should be so modified. It would, in case of such modification, direct that the administrator pay the amount of the judgment and interest, by a day to be named, or that the plaintiff have execution upon his judgment.

. LEONARD, J. The surrogate has ordered the administrator of the estate of Abraham G. Thompson, deceased, to pay to Edward P. Cowles the amount of a judgment recovered by

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him in the supreme court against the said administrator, after a trial at law on the merits, for services rendered by him as proctor and counsel for Henry Sheldon, the former executor of the said estate, in the administration thereof, amounting to two thousand dollars.

This recovery adjudges that the services in question constitute actual, necessary, just and reasonable expenses of the administration which must be borne by the estate.

It is provided by the revised statutes, part 2, chap. 6, title 3, article 3, section 58, (3 *R. S.* 179, § 64, 5th ed.) that such expenses shall be allowed on the settlement of the account of an executor or administrator. The administrator or executor is to be allowed in his account for his services and expenses, before all other claims.

Title 5, § 19, of the same chapter, authorizes a creditor having a judgment against an executor or administrator, after a trial at law upon the merits, to obtain from the surrogate an order against such executor or administrator to show cause why an execution should not issue on such judgment. The next section directs the surrogate to issue a citation, requiring the executor or administrator complained of, to appear and account before him; and if, upon such accounting, it shall appear that there are assets in the hands of such executor or administrator, *properly applicable, under the provisions of chapter six*, to the payment of the judgment, the surrogate is further directed to make an order that execution be issued for the amount so applicable. These provisions appear to be distinct and easily comprehended. There is no difference in respect to the authority conferred upon the surrogate under the two sections last referred to, whether the judgment was recovered for a debt of the deceased testator or intestate, or for a debt contracted by the executor or administrator, for actual, necessary, just and reasonable expenses of the administration.

It is insisted by the learned and ingenious counsel for the administrator, that the surrogate is not authorized to direct

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the payment of these expenses out of the estate, and that the estate does not become chargeable therefor in such manner that the assets in his hands are properly applicable to the payment thereof, under the provisions of the sixth chapter of the statutes above referred to, until the expenses have been actually paid by the administrator.

This position is fallacious. It cannot be admitted that an administrator can hold a fund in his hands to which he is lawfully entitled to resort for the payment of the just and necessary expenses of the administration, and refuse at his pleasure so to apply the fund as to set the creditor at defiance.

It may be conceded, as the appellants' counsel insist, that the administrator who employs the services of counsel in the necessary defense or collection of his trust is personally liable for the payment thereof; but the estate is also liable, and it is not the privilege of the administrator to decide whether he shall be made liable in his personal or representative capacity. That election is to be made by the creditor, if the right of election exists, and not by the debtor. In whichever capacity the administrator is required or compelled to pay the just and necessary expenses of his trust, he is entitled to have the amount refunded from the estate and allowed by the surrogate on the settlement of his account.

The learned counsel for the appellant clearly errs in urging that the authority of the surrogate under sections 19 and 20, above mentioned, refers only to judgments recovered for debts incurred by the deceased. The provisions of chapter 6, in which those sections are embraced, relate to and provide for the payment of the services and expenses of the executor or administrator, just as distinctly as for the debts of the deceased, and a judgment for such expenses is clearly within the provisions of the sections last mentioned.

The order of the surrogate should be affirmed with costs.

In my opinion it is the duty of the surrogate to proceed

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farther than he has done by his order, if the creditor shall so require, and to direct that an execution issue.

CLERKE, J. concurred.

SUTHERLAND, J. dissented.

Order affirmed.

[NEW YORK GENERAL TERM, February 1, 1864. *Leonard, Sutherland and Clerks, Justices.*]

TREVOR & COLGATE vs. WOOD and others.

Where parties have agreed that their communications with each other shall be made by telegraph, this in effect is a warranty by each party that his communications to the other shall be received.

A communication by telegraph is only initiated when it is delivered to the telegraphic operator. It is completed when it comes to the possession of the party for whom it is designed.

The rule that has been established by the courts, in respect to contracts made by letter sent through the mail, is not applicable to communications by telegraph.

Telegraph companies, while conducted by private enterprise, cannot be so clothed with a public official character as to make the receipt of a communication at the office of the company of the same effect, in regard to the acceptance of an offer by a contracting party, as the actual delivery of it would have.

The telegraph company is the agent of the employer, while the post office is conducted by public authority and is not the agent of any person.

A PPEAL from a judgment entered upon the report of a referee. The action was brought to recover damages for the breach of an agreement alleged to have been made by telegraph. The following facts were found by the referee, viz: The plaintiffs and defendants were respectively partners, and were respectively dealers in specie, exchange and bullion; the plaintiffs doing business in the city of New York, the defendants in the city of New Orleans. The following correspondence ensued between them, partly by telegraph,

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partly by mail; the plaintiffs' telegrams being sent by the "Interior or National Line," the defendants' telegrams by the "Seaboard Telegraph Line." On the 30th January, 1860, the plaintiffs telegraphed to the defendants as follows: "To JOHN WOOD & Co.:

At what price will you sell one hundred thousand Mexican dollars per next steamer, deliverable here.

TREVOR & COLGATE."

On the 31st of the same month the defendants answered the above by another telegram, as follows:

"TREVOR & COLGATE, New York:

Will deliver fifty thousand at seven and one-quarter per Moses Taylor. Answer. JOHN WOOD & Co."

The word answer was on the last dispatch as written by the operator at New Orleans, but was not on the copy delivered to the plaintiffs. On the same day the plaintiffs telegraphed to the defendants as follows:

"To JOHN WOOD & Co.:

Your offer fifty thousand Mexicans at seven and one quarter accepted: send more if you can.

TREVOR & COLGATE."

At the same time the plaintiffs sent by mail to the defendants a letter acknowledging the receipt of defendants' telegram, and copying the plaintiffs' telegraphic answer. On the same day the defendants had also sent by *mail* a letter to the plaintiffs, copying defendants' telegram of that date, and adding, "if you accept our offer at $7\frac{1}{4}$, we will ship you by same steamer. We wait your answer to our dispatch of to-day." On 1st February, 1860, (the next day,) the plaintiffs again telegraphed to the defendants as follows:

"To JOHN WOOD & Co.:

Accepted by telegraph yesterday your offer for fifty thousand Mexicans; send as many more same price. Reply.

TREVOR & COLGATE."

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This telegram, as well as that of 31st January, from the plaintiffs, did not reach the defendants until 10 A. M., on 4th February, 1860, in consequence of some derangement in a part of the line used by the plaintiffs above Canton, Mississippi, from noon of 31st January to the morning of February 4, but which was not known to the plaintiffs until 4th February, when the telegraph company reported the line down. On the 3d February, the defendants telegraphed to the plaintiffs as follows :

"Mess. TREVOR & COLGATE, New York :

No answer to our dispatch 31st ; dollars are sold.

JOHN WOOD & Co."

And the same day they wrote by mail in the same terms. The plaintiffs received the last telegram on 3d February, and answered it as follows, by telegram, on the same day :

"To JOHN WOOD & Co. :

Your offer was accepted on receipt and again the next day. The dollars must come, or we will hold you responsible. Reply.

TREVOR & COLGATE."

On 4th February, the plaintiffs telegraphed to the defendants as follows :

"To JOHN WOOD & Co. :

Telegraph company reports line down on thirty-first, hence the failure of our two messages. We sold the dollars and must have them by this or the next steamer, or we are liable for damages. Don't fail to send the dollars at any price. Will write to-day.

TREVOR & COLGATE."

On the same day last mentioned, the defendants telegraphed to the plaintiffs as follows :

"To TREVOR & COLGATE :

No dollars to be had. We may ship by steamer twelfth, as you propose, if we have them. JOHN WOOD & Co."

On the same day they wrote by mail to the defendants a letter, the contents of which it is not material to state. Other correspondence also followed, which it is not material to state.

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here. The defendants, on their part, insisted that the telegraph company employed by the plaintiffs was the agent of the plaintiffs, and the delay in transmitting the plaintiffs' telegrams was through the fault of such agents, and that the defendants, not receiving an answer to their proposal of 31st January as late as the 3d of February, were justified in selling the dollars. The plaintiffs insisted that as the dollars were to be shipped by the *Moses Taylor*, which was to sail on the 5th February, the defendants should have waited until then or about that time. The *Moses Taylor* was, in fact, to sail on the 5th February, and she did sail on that day, at noon, and arrived in New York on the 13th. It is usual not to ship specie until the day before the sailing of the vessel. All the telegrams were punctually transmitted and received on the same day that they were written, except the two above mentioned as failing; all the letters sent by mail were received in due course of mail, which at that time was in seven days. The plaintiffs, by paying an extra price, could have had their telegrams to New Orleans repeated from there, so as to be certain that they had been properly transmitted. This was not done. It is not usual to do it. The market price of Mexican dollars on the 13th February, 1860, was seven and five-eighths above par; thus the loss to the plaintiffs on that account alone was three-eighths of one per cent on \$50,000. They had contracted to sell the \$50,000 to Berend & Co., who claimed damages, and believed they would have made \$750 if the contract had been carried out, but compromised with the plaintiffs and received from them \$250. In July or August, 1859, Wood, one of the defendants, was in the city of New York, and called on the plaintiffs, and then an arrangement was made between them that if the defendants had dollars to sell they should telegraph to the plaintiffs, who should answer whether they would take them or not, and that every thing between them should be done through the telegraph. (Some shipments of specie were afterwards made by the defendants to the plain-

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tiffs in pursuance of contracts thus made by telegraph, before January, 1860.) The two telegraph companies had but one office in the city of New York. The lines of the company employed by the defendants were in running order during all the period in question. The lines of the company employed by the plaintiffs were down on the 31st January, in the afternoon, and thence until the 4th February. The referee found, also, on the evidence, that it was the duty of the telegraph company employed by the plaintiffs on the 31st January, or promptly thereafter, to have notified the office in New York of the break in the line at Canton, and then for the office in New York to have promptly notified the plaintiffs of the same facts, and that it was negligence in the company to delay giving this notice until the 3d of February. He found, also, as matter of fact, that the damages sustained by the plaintiffs by the omission of the defendants to forward the dollars, was \$187.50, with interest from 13th February, 1860. On these facts the referee found, as matters of law, as follows: Assuming that the plaintiffs are not responsible for the negligence of the telegraphic company by which their telegram was forwarded, the contract between the plaintiffs and the defendants was complete on the same day that the plaintiffs' acceptance of the defendants' offer began to be transmitted by said telegraph company to the defendants, viz., on the 31st of January, 1860, or as soon thereafter as the telegram could be transmitted by due diligence, which would be on that or the following day, and then the defendants were bound to fulfill the contract, and to pay the plaintiffs their damages for the non-fulfillment of the same, and they were not justified in attempting to withdraw their offer or in selling the dollars when they did. Confirming his decision to the ruling of the court, he also found, as matter of law, that the plaintiffs were not responsible for the negligence of the telegraphic company, and that they were entitled to judgment against the defendants for their damages for said breach of contract, amounting to \$219.33,

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and also to their costs, to be adjusted. And he directed that judgment be entered accordingly.

Before the case was submitted the counsel for the defendants requested the referee to find, as matter of fact, that the failure to transmit the telegram was owing in part to the omission of the plaintiffs in not ascertaining that the Interior line was down, and then in not sending the telegram by the other line, and also in not having their telegrams repeated. The counsel for the defendants also requested the referee to find, as matter of law: 1st. That by reason of the non-prepayment of the telegrams by the plaintiffs the defendants might have properly refused to receive them, and that no such deposit of the communication here could bind the defendants. 2d. That even if the telegraphic company was not the agent of the plaintiffs, the message did not operate as an acceptance of the offer until actually received by the defendants, and that the withdrawal by the defendants was effective. 3d. That there was no contract in writing between the parties, within the statute of frauds. But the referee refused to find except as above stated,

George R. Thompson, for the respondents. I. There was a valid contract made between the parties. The offer of Wood & Co. was distinctly to deliver to the plaintiffs, by the steamer *Moses Taylor*, which was understood to sail, and did sail from New Orleans to New York on the 5th of February, 1860, certain dollars, at a certain price. This was an offer continuing and binding upon the defendants up to the time the steamer sailed, unless withdrawn previous to its acceptance, and they were bound to hold the dollars at the disposal of the plaintiffs until that time, whether the offer was accepted or not. The proposer may, and has, in this case, determined how long the offer shall continue. "If the proposer receives the assent to it before retracting his offer, he is bound by it." (1 *Parsons on Contracts*, 405. *Boston and Maine R. R. v. Bartlett*, 3 *Cush.* 224. See cases cited

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in Notes to 1 Parsons on Contracts, book 2, ch. 2, pp. 404-8.) If it be considered that the defendants were only bound to wait a reasonable time before disposing of the dollars offered, then that reasonable time is, in this case, to be determined by the sailing of the steamer, if she sailed at the time the defendants supposed she was to sail, when they forwarded the offer. If the proposer fixes a time, he expresses his intention, and the other party knows exactly what it is. If no definite time is stated, then the inquiry is as to what time it is natural to suppose the parties contemplated. The intention is to be gathered from the offer itself, and from the attendant circumstances. There can be no doubt from the offer itself, but that the defendant meant to make the offer continuing until the sailing of the steamer. The steamer was to sail in a few days; the defendants knew it; they offered to send the dollars then if desired, and they were bound to wait until that time before they put it out of their power so to do. The offer did not relate to any particular dollars then in their possession. It does not appear whether they had these dollars on hand, or proposed to procure them elsewhere. It would have been no answer to this action that Wood & Co. expected to be able to procure the dollars, and afterwards found themselves unable to do so. Is it not reasonable to suppose that the plaintiffs thought that they could accept the dollars at any time previous to the sailing of the steamer? The offer is susceptible of no other construction. Three, or four or five days was not an unreasonable time to wait, in any event. The defendants themselves did not exercise due diligence. The offer was accepted by telegraph the same day it was made, again the next day, and also by letter, properly mailed, the same day. All these different acceptances reached the defendants the day before the sailing of the steamer.

II. Either of these acceptances concluded the contract the moment either were put in a proper way of being communicated to the defendants. And the referee under the decision of this court at general term, made no error in disregarding the

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question of negligence. The question is, was there a contract? The definition of a contract is the agreement or meeting of minds for the consummation of any particular object. It has been decided by the court of last resort in this state, in broad terms, that if a proposer makes his offer *by mail*, and that offer is accepted, before notice of its withdrawal, by depositing an acceptance in the post office properly addressed to the proposer, at that moment the contract is complete, and it makes no kind of difference whether the proposer *ever receives the acceptance, or ever hears of it, or not.* (*Vassar v. Camp*, 1 Kern. 441. *Mac-tier v. Firth*, 6 Wend. 103. *Adams v. Lindsell*, 1 Barn. & Ald. 681.) In the case in Wendell, the court say: "Where the offer is by letter, the usual mode of acceptance is by sending a letter announcing a consent to accept; where it is made by a messenger, a determination to accept, returned through him or sent by another, would seem to be all the law requires. There are other modes equally conclusive upon the parties; keeping silence under certain circumstances is an assent to a proposition; *any thing that shall amount to a manifestation of a formed determination to accept, communicated, or put in a proper way to be communicated, to the party making the offer, would doubtless complete the contract. The knowledge of the party making the offer of the determination of the party receiving it, is no ingredient of an acceptance.*"

III. If this is law, then we insist there is a contract in this case. The only question is as to whether there is any difference between the telegraph and the mail, or whether the privilege does not equally apply to the telegraph as to the mail. The reason why the contract is considered binding in the case of the mail is, that the minds of the parties having met, the contract is rendered complete at once. The non-liability of the government for the neglect of the officials of the post office is not the reason. Post office officials are liable for neglect, and the difficulty of tracing the neglect to

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its source, or the lack of responsibility of any post master, is not a reason for the doctrine as established. (*Whitfield v. Lord de Spencer, Cowper*, 754, 765. *Teall v. Felton*, 1 *Comstock* 537.) There is then no real difference between the mail and the telegraph in this respect. And the decisions do not put the case of the mail upon any such ground. The ground is the *absolute completion* of the contract, not that as you cannot sue the post office, therefore you may sue the party.

IV. If the offer was not accepted by telegraph, it was accepted by *mail*.

V. If these views are correct, then certainly the question of the negligence of the telegraph company had nothing whatever to do with the case, and the referee did not err in deciding that the plaintiffs are not responsible for the neglect of the telegraph company. There was no neglect on the part of the plaintiffs; their failure to repeat their messages is of no consequence. It is not usual to do so, nor was it incumbent upon them.

VI. The testimony on the question of negligence was inadmissible for another reason. In order to show it, it was necessary that the answer should allege it. It contains nothing of that sort. (*McKyring v. Bull*, 16 *N. Y. Rep.* 297.)

VII. On the hearing of the former appeal in this case the court decided that the telegraph company was not the agent of the plaintiffs, and that therefore they are not responsible for its negligence. This decision is evidently correct, especially in view of the fact that there was an arrangement between the parties to correspond by telegraph in relation to business, and that this contract was made in pursuance of that arrangement. And the subsequent ruling of the referee granting the judgment appealed from by this appeal was a matter of course.

VIII. It is evident that this contract was not void under the statute of frauds. It is proved beyond question that the defendants sent an offer. This they subscribed before they

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sent it, and do not deny it. It was not necessary to produce the original telegram. The contract was confirmed by a letter which was produced, and which was signed by the defendants.

Ira D. Warren, for the appellants. I. The referee erred in finding as a fact, "*that it is not usual to have telegrams repeated.*" All the evidence upon that subject is the other way.

II. The referee erred in finding, as a conclusion of law, that the contract was completed on the same day that the plaintiffs' acceptance of defendants' offer began to be transmitted to the defendants, and that it was not necessary that the defendant should actually receive the message of acceptance to make a binding contract. (1.) The plaintiffs, then, must rely wholly upon the assumption that communications by telegraph, between contracting or negotiating parties, are governed by the rule laid down in the cases of *Mactier v. Frith*, and *Vassar v. Camp*, in reference to negotiations by mail. It is submitted that, as the question is new, this court will not establish such a rule in relation to communications by telegraph, unless it be supported by clear analogy or by conclusive reasons founded upon justice and public policy, and that it is supported by neither. (2.) When the rule in reference to mail communication was first established in this state, it required every argument in its favor to support it. And it is submitted that it must soon be modified here in cases where the parties have also telegraphic facilities, or business men will cease to use the mail for business purposes. (3.) There is no more reason why this rule should be applied to a telegraphic message than to a message sent by a private messenger, or by an express company. In case of mail, the medium of communication is not responsible to, or under the control of either party, and is the agent of neither. In the language of Selden, J. in *Vassar v. Camp*, "He (the person depositing in the post office) can do nothing more to insure its safe delivery, and is not responsible for its miscarriage." *The*

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telegraph is controlled and managed by private persons or corporations. Its owners receive compensation, and are liable for errors and failures in the same way as individuals. (4.) In this case there were two distinct lines. The plaintiff had a choice of messengers. There is no such choice in case of mail. (5.) The person depositing a letter in the post office cannot know that it will be received in due course of mail, and he necessarily acts upon the faith that it *will*. Not so with the telegram. By repeating he can be assured of its delivery, or ascertain its failure. (6.) The referee has found that the damage was occasioned by the negligence of the National Telegraph Company, employed by the plaintiffs. Whether agent of the plaintiffs or not, it is responsible to them for damages occasioned by its negligence in their employment. (*Sedgwick on Damages*, 62, 63. *Bryant v. American Telegraph Co.*, Transcript, March 14, 1862. *N. Y. &c. Tel. Co. v. Drybury*, 35 Penn. R. 298. *W. & C. Tel. Co. v. Habron*, 15 Gratt. [Va.] R. 122. *Parks, &c. v. Allen, &c. Tel. Co.* 13 Cal. 422. *Camp v. Western Tel. Co.*, 1 Met. [Ky.] R. 164.) It is not responsible to the defendants, as there was no contract between them. The rule, contended for by the plaintiffs, would charge an innocent party, who has no remedy, with damages to—if you please—an equally innocent party, but who has complete remedy against the one properly chargeable. No legal proposition can be established which ever produces such absurd consequences. *The rule is well established that whenever one of two innocent parties must suffer by the act of a third, he who has enabled the third party to do, or occasion the injury, must sustain the loss.* (*Dows v. Greene*, 24 N. Y. Rep. 645.) The ruling of the general term, in reversing the former judgment, may perhaps be reconciled with the common sense of the case, by leaving the parties to the law governing contracts in ordinary cases, viz., that the acceptance must be *communicated* within a reasonable time, to the party to be charged, or his authorized agent. Each retaining

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any remedy they may have against third parties in case of accident or neglect. The rule, in the case of the mail, is founded upon other considerations than the mere fact that the post office department is not held to be agent of either party; in fact the absence of the relation of principal and agent, between the party depositing the acceptance, and the mail which carries it, seems scarcely to have entered into the reasoning of the cases, and *the considerations which controlled the court* in adopting that rule do not apply to telegraphic communications as shown above. A party is chargeable with all the information he might have obtained by reasonable diligence. Here he knew, or should have known, that this telegraph was down and that another line was running. Suppose a party knew that, by reason of an insurrection the mails were entirely stopped, would a deposit in the post office of an acceptance bind the other? Clearly not, but were there a telegraph line working, which he might use, the case would be stronger. Then, should the offerer withdraw his offer before the mails started, would any reason remain for holding a contract completed? (7.) Suppose the defendants had not received the telegram of acceptance until February 5, and had sold their dollars when the steamer sailed, or had the plaintiffs deposited their telegram when they knew both lines were down, would defendants have been liable? If not, then there is no such rule, and the only question is, whether the defendants waited for a reasonable time. The referee has found that they did. (8.) The plaintiffs might have withdrawn their message of acceptance on the second, before it was actually transmitted, and they would not have been bound by it. Had it been a letter sent by mail, they could not have done it. If the contract is not binding on one party, it should not be on the other.

III. The defendant waited *more than* a reasonable time. The message contained the word "*answer*," which meant *answer at once*, and they waited four days for what should have reached them in one day at farthest. (*Story on Cont.*

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§§ 380, 384, 388.) The plaintiffs had a right to withdraw their offer, and did so on the 3d February, and before the acceptance reached them. (*Payne v. Cave*, 3 T. R. 148. 1 *Parsons on Cont.* 399-408, and cases cited. 3 *Cush.* 234.) The referee erred in finding that the telegram of February 3 did not amount to a withdrawal.

IV. The plaintiffs were guilty of negligence. They knew that by repeating their telegram they could ascertain whether it went through or not, and if not, could send it by the other line; or, if both failed, by knowing it they would avoid entering into engagements resulting in damage. They cannot recover damages of the defendants which their own negligence, in any way, contributed to produce, or where caused by the negligence of the medium of communication they employed to transmit their message. There was no arrangement between the parties to employ this particular company. There were two companies.

V. There was a condition attached to the offer. The word "answer," on defendants' telegram, was equivalent to saying "we must receive an answer at once, to make this binding." The plaintiffs' theory, and the only one upon which this case can stand, is that the company being the agent of no one, and not responsible for its acts, its acts or omissions do not affect the rights of the parties. The non-reception of this word by the plaintiffs does not alter its effect. The condition was not complied with and no contract was made.

VI. The plaintiffs did not prepay the telegraph company's charge upon their messages of acceptance. The defendants might properly have refused to receive a communication so incumbered, and such a message cannot be considered as delivered, for the purpose of binding a party who could only know its contents by paying a charge which the plaintiffs themselves should have paid.

VII. The real responsibility is with the National Telegraph Company, where the referee places it. The fault was theirs, and they are liable in damages to the plaintiffs who employed

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them. If the plaintiffs should recover of the defendants, the latter would be remediless, as there was no privity of contract between them and that company.

VIII. Communications by telegraph are not such memoranda in writing as to take the case out of the statute of frauds. (1.) There is no evidence that the defendants left a copy of the dispatch of 31st January at the office in New Orleans, signed by them, or that such a writing so signed was delivered to the plaintiffs. (2.) If it be answered that the defendants made the telegraph company their agent to sign and deliver such a memorandum in writing, the fact of the agency overturns the only theory upon which the plaintiffs' case can stand.

By the Court, LEONARD, J. There was never any *agregatio mentium*, or meeting of the minds of the parties in respect to the purchase and sale of the dollars in question. The plaintiffs failed to notify the defendants of the acceptance of their offer until after the defendants had countermanded or recalled it.

The plaintiffs must be regarded as having undertaken on their part to bring to the defendants the knowledge of their acceptance or refusal of the offer made. The parties had agreed beforehand that their communications should be made by telegraph. This in effect was a warranty by each party that his communication to the other should be received. It cannot be supposed that the party who was to receive the communication was willing to incur the hazard of a safe delivery of the messages of the other party with whom he was in treaty through the medium of the telegraph.

The communication is only initiated when it is delivered to the telegraphic operator. It is completed when it comes to the possession of the party for whom it is designed.

We think that the rule that has been established by the courts in respect to contracts made by letters sent through the mail, is not applicable to communications by telegraph.

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(*Mactier v. Frith*, 6 Wend. 103. *Vassar v. Camp*, 1 Kernan, 441.)

The public post office is governed by no private interests. The officers who direct its operation are regulated by law, and its violation is punished criminally. The operators of the telegraph are appointed or employed by private enterprise, and are responsible to those who employ them for the proper performance of their service. There are also other distinctions. The telegraphic companies have been conducted, so far as has come to my knowledge, with great integrity and fidelity, but an institution of that description cannot, while conducted by private enterprise, be so clothed with a public official character as to make the receipt of a communication at the office of the telegraph company of the same effect, in relation to the acceptance of an offer by a contracting party, as the actual delivery of it would have.

The judgment should be reversed, and a new trial had before the same referee. The costs of the appeal to the appellant to abide the event.

[NEW YORK GENERAL TERM, February 1, 1864. *Leonard, Sutherland and Clarke, Justices.*]

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The constitution of the United States extends the judicial power of the union to all cases in law and equity arising under the constitution, laws and treaties of the United States. And it has been decided that a case arises, within the meaning of this provision, as well when the defendant seeks protection under a law of congress, as when a plaintiff comes into court to demand some right conferred by law.

Accordingly *held* that congress having, by the act of March 8, 1863, relating to *habeas corpus*, &c. provided that on suits being brought for any arrest, imprisonment &c. made "by virtue or under color of any authority derived from, or exercised by or under the president of the United States, or any act of congress," the defendant may remove such action into the circuit court of the United States, the court in which the action is brought has

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nothing to do with the validity of the act of congress as a defense to the suit. It is sufficient that the defense involves the construction and effect of a law of congress. CLERKE, J. dissented.

If the defendant, in an action for false imprisonment, sets up as a defense the orders &c. of the president, the question for the court is not as to the constitutionality of the fourth section of the act of congress, declaring that the order or authority of the president shall be a defense, in all courts, to any action for an arrest &c. made under or by color of the president's order, or any law of congress; but is as to the constitutionality of the fifth section of the act, authorizing the defendant to remove the action from the state court to the circuit court of the United States. *Per* SUTHERLAND, J. And upon an appeal from an order denying a motion to remove the cause to the circuit court of the United States, the question is not as to the constitutional power of the president to order the arrest, imprisonment &c. or as to the constitutional power of congress to authorize the president to order the arrest, imprisonment &c. complained of; but it is as to the constitutional power of congress to give the circuit courts of the United States original and exclusive jurisdiction of the trial of actions for such arrests, imprisonments, &c.

In cases coming within the fifth section of the act of March 3, 1863, no application to the state court is necessary in order to give to the circuit court of the United States possession of the action; but if such an application is made, and denied, the general term may, on appeal, direct an order to be entered transferring the cause to the circuit court of the United States.

APPEAL from an order made by Justice CLERKE at chambers, denying a motion made by the defendant to remove the proceedings in this action to the circuit court of the United States for the southern district of New York. The action was brought by the plaintiff to recover damages for an alleged false imprisonment, caused by the instigation, procurement, direction and command of the defendant. He stated, in an affidavit read in opposition to the motion, that on the 19th day of December, 1861, while at the New York Hotel, in the city of New York, he was accosted by a person to him unknown, who pronounced him a prisoner, and with force and arms caused the plaintiff to go with him, after several delays and interruptions, to Fort Lafayette, and then and there incarcerated the plaintiff, and caused him to be kept a prisoner in close confinement for near the space of four

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months. And that during such confinement he was not allowed to send any communication to his friends or other persons with a view of seeking legal relief, and that deponent had not been informed of the cause of his arrest, or the authority whereby he was arrested, except that he was shown by the person who arrested him a telegram, of which the following is a copy :

“The Hon. Geo. W. Jones, late Minister to Bogota, and late Senator in Congress from Iowa, leaves here this afternoon for New York Hotel, arrest him and send him to Fort Lafayette. W. H. SEWARD.

Dated Washington City, Dec. 19, 1861.”

The motion was founded upon a petition of the defendant, in which he alleged that he was secretary of state of the United States, and that the action was brought against him for acts alleged to have been done by him as such, under authority derived by him from the president of the United States, in causing and procuring the plaintiff to be arrested and imprisoned, or for some other wrong alleged to have been done the plaintiff under such authority, during the present rebellion of the so-called Confederate States against the government of the United States of America. The defendant claimed that the case came within the act of congress passed March 3, 1863, entitled “An act relating to *habeas corpus* and regulating judicial proceedings in certain cases,” the fifth section of which provides that if any suit has been or shall be commenced against any officer, civil or military, or any other person, for any arrest, imprisonment &c. during the present rebellion, “by virtue or under color of any authority derived from or exercised by or under the president of the United States, or any act of congress,” the defendant may remove such action into the circuit court of the United States for the district where the suit is brought, &c.

The case at chambers is reported, 40th Barbour, 563.

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Jas. T. Brady and Wm. C. Traphagen, for the appellant.

Wm. F. Allen and E. R. Meade, for the respondent.

LEONARD, P. J. The question is not whether the fourth section of the act of congress passed March 3d, 1863, affords a valid defense to the action. The true question is this: Is it in the power of congress to give the circuit court jurisdiction of the case? The constitution extends the judicial power of the Union to all cases in law and equity arising under the constitution, laws and treaties of the United States. The defense in this case arises under the act of congress, and the validity of that act, considered in the light afforded by the constitution, will be one of the principal subjects to be determined at the trial. It has been decided that a case arises, within the meaning of the constitution, as well when the defendant seeks protection under a law of congress as when a plaintiff comes into court to demand some right conferred by law.

It has been objected that the original jurisdiction of all actions may be drawn into the federal courts, by similar enactments of congress, and that the *case arises* within the meaning of the constitution, only after a trial and judgment in this court, when the action can be transferred by writ of error or appeal, and brought before the federal courts for review.

The power of transferring causes to the United States circuit in a similar manner, where the question involved was of an appellate and not an original jurisdiction, has long been sustained. Chief Justice Marshall says, in the case of *Osborn v. The Bank of the United States*, (9 *Wheaton*, 821,) "We perceive no ground on which the proposition can be maintained that congress is incapable of giving the circuit courts original jurisdiction, in any case to which the appellate jurisdiction extends." Congress has enacted that the defendant may interpose in his defense the orders &c. of

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the president, and has directed the transfer of cases involving such a defense, in the manner prescribed, into the circuit court.

According to the statements of the defendant such a case has arisen. We have nothing to do with the validity of the law as a defense to the action. It is sufficient for the state court that the defense involves the construction and effect of a law of congress. The case has then arisen, when the courts of the United States may have jurisdiction, if congress so directs. If the law does not afford a constitutional or valid defense, it cannot now be doubted that the learned justices of the United States courts will so declare it, when the jurisdiction of such cases will remain in the state courts as before the enactment of the law. It is not our duty, therefore, to assert the independence of our state sovereignty and jurisdiction; for the final construction and effect of all acts of congress may be brought before the United States courts by the express provisions of the constitution. The manner of taking the cause to those courts is of no consequence. The supreme court of the union must be relied on to prevent its jurisdiction from being unlawfully extended by congress. I am of the opinion, therefore, that congress has the power to direct the transfer of such cases.

In my opinion this application was unnecessary in order to vest the United States circuit court with the possession of the action, but the discussion has not been lost, inasmuch as it will be now settled that this court will not in this judicial district take further cognizance of cases which have been transferred under this act of congress. It is very proper that an order be entered transferring the cause to the United States circuit, as it affords the evidence in this court of the disposition made of it. In arriving at my conclusions I have consulted *Story's Com. on the Const.* ch. 38, §§ 903, 906, &c., &c., &c.; *Martin v. Hunter*, (1 *Wheaton*, 304;) *Cohens v. The State of Virginia*, (6 *id.* 264;) *Osborn v. The Bank of the United States*, (9 *id.* 738.) As a rule of practice I think the court should not approve any sureties unless the amount

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of the bond is equal to the sum in which the defendant in the action has been held to bail, if bail has been required in the state court. This fact should be made to appear to the satisfaction of the judge to whom the bond is presented for approval.

The decision in this case will also embrace the case of *Gudeman v. Wool*, argued at the same general term as the present case.

The order appealed from should be reversed, and the motion made below should be granted, without costs.

SUTHERLAND, J. The question is not as to the constitutionality of the fourth section of the act, declaring that the order or authority of the president, during the rebellion, shall be a defense in all courts to any action for arrest, imprisonment, or act done or omitted to be done, under or by color of the president's order, or of any law of congress ; but the question is as to the constitutionality of the fifth section of the act, authorizing the defendant in any such action to remove the same from the state court to the circuit court of the United States for the district where the suit is brought, for trial, on complying with certain requirements specified in the section ; that is, on entering his appearance ; filing his petition stating the facts ; offering good and sufficient surety, &c.

The question presented by this appeal is not as to the constitutional power of the president to order the arrest, imprisonment &c. or as to the constitutional power of congress to authorize the president to order the arrest, imprisonment &c. ; but the question presented by the appeal is as to the constitutional power of congress to give the circuit courts of the United States primary or original, and, (as to the state courts,) exclusive jurisdiction of the trial of actions for such arrests, imprisonments &c.

In determining the question as to the constitutionality of the fifth section of the act we must assume, I think, that the

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trial of this action will involve the determination of the question as to the constitutionality of the fourth section ; that congress in passing the act considered that the trials of the actions to be removed to the circuit courts of the United States under it would involve the determination of the question as to the constitutionality of the fourth section, whether tried in the state or United States courts ; and that congress intended by the fifth section to take from the state courts, and give to the circuit courts of the United States, the right and power to determine that question.

Had congress the constitutional power to do this ? That is the question. If congress had the power then the order appealed from, denying the defendant's motion to remove the action and all proceedings therein to the circuit court of the United States for the southern district of New York, should be reversed, and, I think, an order made directing such removal. If congress had not the power, then the order appealed from should be affirmed.

If no steps had been taken for the removal of the action from this court, and the action should be tried in this court, and the question as to the constitutionality of the fourth section of the act should be decided adversely to the defendant by the court of appeals of this state, the supreme court of the United States would have final and conclusive *appellate* jurisdiction of the question. (*Const. U. S. art. 3. Sec. 25 of the Judiciary act. 1 Stat. at Large, 85. Cohens v. Virginia, 6 Wheat. 264. Miller v. Nichols, 4 id. 312.*)

Cannot congress give the circuit courts of the United States *original* jurisdiction in any case to which this *appellate* jurisdiction extends ? In *Osborn v. United States Bank*, (9 *Wheat. 738*,) cited by Judge Leonard, Ch. J. Marshall said he could perceive no ground for saying that congress could not. In that case one of the questions was, whether congress could constitutionally confer on the bank the right to sue and be sued "in every circuit court of the United States." It was held that such a suit was a case arising un-

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der a law of the United States; consequently, that it was within the judicial power of the United States, and congress could confer upon the circuit court jurisdiction over it. See also *Curtis' Com. on the Jurisdiction &c. of the Courts of U. S.* §§ 12 and 13; the latter section containing a quotation from another portion, (p. 865,) of the opinion of Ch. J. Marshall in *Osborn v. The Bank of the United States* apparently quite pertinent to the question in this case.

I concur then in the conclusion of Judge Leonard, that congress had the power to direct the transfer to the circuit court of the United States. Probably an order of this court directing such transfer is not actually necessary, but to make one would be in accordance with usage in like cases; and besides, such an order would be the best evidence of the determination of this court that it no longer had jurisdiction of the action.

It appearing that the defendant has complied with the requirements of the act for such transfer, the order appealed from should be reversed, and an order made by this court for the removal of the action and all proceedings therein to the circuit court of the United States.

CLERKE, J. (dissenting.) I see nothing whatever in the arguments of my brethren, or in those of other judges on the same subject, to induce me to recede from the position which I have attempted to maintain at special term. They have all alike, in my very humble judgment, unaccountably overlooked the only point claiming consideration on the great constitutional subject.

According to the doctrine upheld by my brethren, we can scarcely conceive of any act, committed by any officer of the general government, under color of any authority derived from or under the president, which may not constitute a genuine veritable case arising under the constitution of the United States, and which, therefore, may not rightly come within the cognizance of their judicial power. It is only

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necessary to claim that it was committed under color of that authority, and was, therefore, justified by the constitution, however monstrous and appalling the act may be, to make it, according to this doctrine, a case arising under that constitution. For, of course, according to the terms of the claim, the claimant appeals, through this remarkable statute, to the constitution for his justification, and, however palpably frivolous such a claim may be, however palpably manifest may be the conviction that the constitution no more sanctions such an act than it sanctions the burning of the capitol, the dispersion of congress, and the shooting, imprisonment or exile of the men of whom it is composed, yet it is claimed to present a question, and, therefore, a case arising under the great charter of constitutional liberty in America; the perpetrator of the outrage making that a question, which is unquestionably no question; and the judicial power of the state is ousted of its legitimate jurisdiction. Thus, this extraordinary statute prescribes not only that the character, but the mere assertion, of the wrongdoer shall determine jurisdiction, and that the subject matter, which has been always held, except in cases affecting ambassadors, other diplomatic ministers and consuls, as alone the criterion of jurisdiction, shall be excluded from consideration. Surely, if this can be done by congress, the government of the United States of America is not, as all men have heretofore supposed, incontestably a government of limited powers and duties, and is, if not one of unlimited powers and duties, nevertheless, of very accommodating expansibility. This is a novel and strange theory of development in America.

But, it is asserted, as the appellate power of the supreme court of the United States extends in certain cases to state tribunals, that this case would after judgment reach the federal jurisdiction, and that, therefore, it may as well be transferred to the United States circuit court before judgment. Even if the supreme court of the United States would *entertain* such a case on appeal, this is no controlling

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reason why it should, necessarily, be transferred to the United States circuit for adjudication in the first instance. For, the only question to be determined by us on this motion, is whether congress has the power to transfer cases of this description to the circuit court of the United States, not whether, ultimately, it may reach the appellate jurisdiction of the United States supreme court. The act of Congress, passed in 1789, "to establish the judicial courts of the United States," no doubt provides that a final judgment or decree in any suit in the highest court of law or equity of a state, where is drawn in question the validity of a statute of the United States, and the decision is against its validity, may be re-examined and reversed or affirmed in the supreme court of the United States. But, if it is too clear for controversy that the statute is an outrage on the constitution—if it is palpably usurpation—if it is plain to the most unlettered citizen that the statute is an attempt to subvert all the securities which the founders of the government have provided for the preservation of personal liberty, and to invest one man with unlimited dictatorial power, and, therefore, that the appeal was palpably frivolous, I presume the court would hear no argument on such an appeal, and would, forthwith, affirm the judgment or dismiss the suit. Would they, for instance, hearken to an appeal involving the validity of an act of congress giving the president or any other member of the government power by a *coup d'etat* to extinguish the legislative branch, as Cromwell did the long parliament, and substitute a Barebones legislature in its place. Surely not, if they too were not struck down, and were not, (if such debasement can be imagined,) by force, by fear, or by corrupt appliances, or selfish aspirations robbed of independence. So that, the consideration, whether the act is not palpably void, must present itself on appeal, and now presents itself to us on this motion; and, if it is palpably void, I repeat, it would not be treated on appeal as worthy of being for a moment entertained. I still consider the defense in this case just

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as destitute of color as the case which I have imagined. Whether under the pretext of authority from the president of the United States, any one citizen, at his mere will and pleasure, without any intervention of the judicial tribunals, can incarcerate another citizen, not subject to military law, in a loathsome dungeon, for many months, or for a day or an hour, cannot, under any circumstances in which the nation may be placed, be treated as a question constituting a case arising under the constitution; and any statute, which declares the contrary, is palpably void.

The order made at special term should be affirmed, with costs.

[NEW YORK GENERAL TERM, February 1, 1864. *Leonard, Clarke and Sutherland, Justices.*]

HEADLEY and SPEELMAN vs. ELECTA GOUNDRY.

A release of the lien of a mortgage, though void at law if not under seal, may be enforced in equity.

A court of equity can give effect to parol contracts; and a release not under seal is equivalent to a parol agreement for a release of the premises described in it.

Relief is given in such cases, and imperfect contracts made effectual, where the party seeking such relief is clearly entitled to the intervention of the court; upon the principle that what is agreed to be done is considered in equity as done when it ought to be done.

But where G. proposed to H. and S., to whom he and his wife had executed a mortgage, that if they would release the mortgaged premises from the lien of the mortgage, he would make a general assignment to them of all the rest of his property, to which H. and S. assented, and they accordingly executed a release not under seal; whereupon G. executed an assignment to H. and S. of his property, but before doing so he had, without the knowledge or consent of H. and S. assigned to his wife a demand held by him, against a third person, amounting to over \$1600; and he executed a mortgage upon the premises, to his wife, to secure a previous debt; *Held* that the assignment of such debt to the wife of G. was a fraud upon H. and S. for which the wife was responsible; and that in an action by H. and S. to foreclose

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the mortgage she could not claim to have the release established in her favor, except upon the relinquishment by her of the \$1600 debt so assigned to her.

THIS action was brought to foreclose a mortgage, executed by Caleb Goundry and the appellant, his wife, to the plaintiffs, on the 15th of March, 1860, for the purpose of securing them as his indorsers. The defendant, Mrs. Goundry, appeared and answered, and in her answer, among other things, she alleged: That it was agreed that, in consideration that Goundry would make an assignment to the plaintiffs of *all his real and personal property*, and prefer the plaintiffs, and put their debts and liabilities in the first class, *so as to secure them against their liability*, the plaintiffs would release the house and lot in question from the lien of their mortgage, &c. The issue joined in said action was tried before the court at a special term, held in Yates county, on the 12th of February, 1862. The court, after hearing the proofs and allegations of the parties, found the following facts: 1st. The execution and delivery of the mortgage by Goundry and wife to the plaintiffs, as mentioned in the complaint. 2d. The making of the notes by Goundry and the indorsement by the plaintiffs for Goundry, as set forth in the complaint. 3d. That Goundry wholly failed to pay and take up the notes, and that the plaintiffs, as indorsers, were compelled to pay and had paid and taken them up. 4th. That there was due to the plaintiffs on account of having paid and taken up said notes, the sum of \$5554.98. 5th. That the defendant, Mrs. Goundry, between 1849 and 1853, let her husband have some money belonging to her, received from her father's estate, which, on the 10th of December, 1860, with the interest, amounted to \$2500; that she took no note or memorandum therefor at the time. Goundry promised to repay it with interest. 6th. That on the 10th of December, 1860, Goundry proposed to the plaintiffs that if they would release the house and lot in question from the lien of their mortgage, he would make a general assignment of *all the rest of his property* to

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them, except certain high wines, &c. then on hand: to which the plaintiffs consented, *upon condition that Goundry should and would fully secure them*, by his other property. 7th. That on the 11th of December, 1860, Goundry made a general assignment to the plaintiffs, as assignees, placing the demands for which they were liable among the preferred creditors, Goundry representing, at the time, that there was sufficient to pay all the demands mentioned in the first class. That the plaintiffs, relying upon such representations, and believing that Goundry had assigned all the property which he had on the 10th, when the proposition to release the house and lot was made, &c., signed a writing without seal, on the back of the mortgage, in these words: "I, Moses B. Headley, and Levi Speelman, the within mortgagees, do hereby release all claim, which we have by virtue of the within mortgage, to the premises described in the within mortgage, to wit: All [&c. describing the house and lot,] and hereby direct the discharge of the record of the same. Dated December 10th, 1860." 8th. That after the conversation between Goundry and the plaintiffs, on the 10th of December, and before the execution and delivery of the assignment, Goundry, without the knowledge of the plaintiffs, made over to his wife a demand which he held against some men in Pennsylvania, for high wines sold, of over \$1600, which was good and collectable. That at the time of the delivery of the assignment, and the signing of the writing on the mortgage, by the plaintiffs, they were wholly ignorant of the fact that Goundry had made over to his wife the demand in Pennsylvania; the plaintiffs believing that he had assigned to them all the property which he had on the 10th, at the time of making the proposition to release the house. 9th. That on the day of executing the assignment, Goundry executed the mortgage to his wife, mentioned in her answer. 10th. That the property assigned by Goundry would not pay more than sixty cents on the dollar of the preferred debts. 11th. That the preferred demands amounted to over \$12,500, and the assigned property

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was not worth over \$8000, including the house and lot. That the demands for which the plaintiffs were liable, as indorsers for Goundry, exceeded \$10,000.

Upon the foregoing facts, the court found and decided as a conclusion of law, 1st. That the writing signed by the plaintiffs on the mortgage, on the 11th of December, 1860, was wholly inoperative, and did not release the mortgaged premises from the lien of the mortgage, and that the plaintiffs' mortgage was still a lien upon the whole of the mortgaged premises, &c. 2d. That the mortgage was a valid lien upon the whole of the mortgaged premises, to the full amount of the sum of \$5554.98, as aforesaid, found due the plaintiffs, prior to any lien or claim which the defendants, or either of them, have upon said mortgaged premises, or any part thereof. 3d. That the plaintiffs were entitled to the usual judgment of foreclosure, and that the mortgaged premises be sold, &c. 4th. That in case there should be any deficiency the plaintiffs should have judgment against Goundry for such deficiency, &c. Upon filing the findings and decision of the court, judgment was accordingly entered on the 7th of August, 1862. To which the defendant, Electa Goundry, excepted, and appealed to this court.

D. J. Sunderlin, for the appellant.

D. B. Prosser, for the respondents.

By the Court, E. DARWIN SMITH, J. Upon the facts found by the judge before whom the action was tried, without a jury, I do not see why the judgment rendered was not correct. Assuming that the release executed by the plaintiffs was invalid at law, for want of a seal, the defendant, Mrs. Goundry, to establish it in equity, was bound to show that she had a superior equity to the plaintiffs. This release was valid in equity, and a court of equity would establish and enforce it, if in equity and good conscience Mrs. Goundry, as against

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the plaintiffs, is entitled to such relief, upon equitable principles. A court of equity can give effect to parol contracts, and this release is certainly equivalent to a parol agreement for a release of the lot or premises described in it. Relief is given in such cases, and imperfect contracts made effectual, where the party seeking such relief is clearly entitled to the intervention of the court, upon the principle that what is agreed to be done is considered in equity as done when it ought to be done, and such is the question presented in this case. Ought this court to deem this release to be valid in equity, and give it effect, notwithstanding its want of a seal, which though strictly required at law, is a mere legal formality, which courts of equity may disregard? It is found by the judge who tried this cause that Caleb Goundry, who was largely indebted to the plaintiffs, proposed to them, on the 10th of December, 1860, that they should release to his wife the house and lot in question, from the lien of the mortgage then held by them, and which the plaintiffs in this action are seeking to foreclose; and as an inducement for them so to do he said he would make a general assignment to them of all the rest of his property. That the plaintiffs assented to such proposition, and executed such release on the same day; that on the next day Goundry executed such assignment, but before the execution of the same, and on the said 10th day of December, without the knowledge of the plaintiffs, he assigned or made over to his wife a demand which he held against some men in Pennsylvania, for high wines sold by him, amounting to over \$1600, which was good and collectable. Upon this finding upon the facts, which is fully warranted by the evidence, the assignment of the debt to his wife was a clear fraud upon the plaintiffs. Goundry himself swears that he told Mr. Headley, on the 10th of December, that if he and Mr. Speelman would release their right upon it (the house and lot) "under the mortgage which they held, I would make an assignment to them of my other property." It was clearly dishonest in Goundry to get this release from

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was not worth over \$8000, including the house and lot. That the demands for which the plaintiffs were liable, as indorsers for Goundry, exceeded \$10,000.

Upon the foregoing facts, the court found and decided as a conclusion of law, 1st. That the writing signed by the plaintiffs on the mortgage, on the 11th of December, 1860, was wholly inoperative, and did not release the mortgaged premises from the lien of the mortgage, and that the plaintiffs' mortgage was still a lien upon the whole of the mortgaged premises, &c. 2d. That the mortgage was a valid lien upon the whole of the mortgaged premises, to the full amount of the sum of \$5554.98, as aforesaid, found due the plaintiffs, prior to any lien or claim which the defendants, or either of them, have upon said mortgaged premises, or any part thereof. 3d. That the plaintiffs were entitled to the usual judgment of foreclosure, and that the mortgaged premises be sold, &c. 4th. That in case there should be any deficiency the plaintiffs should have judgment against Goundry for such deficiency, &c. Upon filing the findings and decision of the court, judgment was accordingly entered on the 7th of August, 1862. To which the defendant, Electa Goundry, excepted, and appealed to this court.

D. J. Sunderlin, for the appellant.

D. B. Prosser, for the respondents.

By the Court, E. DARWIN SMITH, J. Upon the facts found by the judge before whom the action was tried, without a jury, I do not see why the judgment rendered was not correct. Assuming that the release executed by the plaintiffs was invalid at law, for want of a seal, the defendant, Mrs. Goundry, to establish it in equity, was bound to show that she had a superior equity to the plaintiffs. This release was valid in equity, and a court of equity would establish and enforce it, if in equity and good conscience Mrs. Goundry, as against

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the plaintiffs, is entitled to such relief, upon equitable principles. A court of equity can give effect to parol contracts, and this release is certainly equivalent to a parol agreement for a release of the lot or premises described in it. Relief is given in such cases, and imperfect contracts made effectual, where the party seeking such relief is clearly entitled to the intervention of the court, upon the principle that what is agreed to be done is considered in equity as done when it ought to be done, and such is the question presented in this case. Ought this court to deem this release to be valid in equity, and give it effect, notwithstanding its want of a seal, which though strictly required at law, is a mere legal formality, which courts of equity may disregard? It is found by the judge who tried this cause that Caleb Goundry, who was largely indebted to the plaintiffs, proposed to them, on the 10th of December, 1860, that they should release to his wife the house and lot in question, from the lien of the mortgage then held by them, and which the plaintiffs in this action are seeking to foreclose; and as an inducement for them so to do he said he would make a general assignment to them of all the rest of his property. That the plaintiffs assented to such proposition, and executed such release on the same day; that on the next day Goundry executed such assignment, but before the execution of the same, and on the said 10th day of December, without the knowledge of the plaintiffs, he assigned or made over to his wife a demand which he held against some men in Pennsylvania, for high wines sold by him, amounting to over \$1600, which was good and collectable. Upon this finding upon the facts, which is fully warranted by the evidence, the assignment of the debt to his wife was a clear fraud upon the plaintiffs. Goundry himself swears that he told Mr. Headley, on the 10th of December, that if he and Mr. Speelman would release their right upon it (the house and lot) "under the mortgage which they held, I would make an assignment to them of my other property." It was clearly dishonest in Goundry to get this release from

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the plaintiffs upon an agreement to assign all his property, and retain and assign to his wife the \$1600 claim or debt above mentioned; and Mrs. Goundry is responsible for this fraud. Her husband made the agreement for her, and she cannot avail herself of the benefit of the agreement made by him with the plaintiffs for her benefit, and disavow a part of the bargain. She cannot come into a court of equity for relief in respect to this release imperfectly executed, and retain the \$1600 she has received from her husband in fraud of the agreement made when the release was executed. She has at best but an equal equity with the plaintiffs, for both are creditors of her husband, and they, the plaintiffs, have strictly the legal title. Courts of equity never overreach the legal title when it is sustained by an equal equity with that of the party seeking relief. The only ground upon which Mrs. Goundry's claim to have this release established in her favor must be the relinquishment by her to the plaintiffs, under the assignment, of the \$1600 she received on the debt against the Pennsylvania debtors of her husband, transferred to her by him, in violation of his agreement with the plaintiffs. No offer being made in her answer to restore or transfer such debt or its proceeds to the plaintiffs, she is clearly entitled to no relief in this court; and the judgment of foreclosure ordered by the special term was clearly proper, and the same should be affirmed, with costs.

Judgment accordingly.

[MONROE GENERAL TERM, September 7, 1863. *E. Darwin Smith, Johnson and Welles*, Justices.]

NEWTON and CLARK, executors &c., vs. McLEAN and others.

The rule in equity is that, as between two parties having equal equities, the prior equity must prevail; but if the party having the subsequent equity clothes himself with the legal title before he has notice of the prior equity, such legal title must prevail.

Where one conveys land to another by deed absolute on its face, and the grantee, while thus apparently invested with the legal title, mortgages the land to a third party for a valuable consideration, the title of the mortgagee cannot be divested by proof that the grantee in the deed held the premises merely in trust for another, without any interest therein, at the time he assumed to execute the mortgage thereon.

To overreach the mortgage so given by the holder of the legal title, which vests the mortgagee with a legal estate in the premises, the person claiming to be the equitable owner of the premises is bound to go further than simply to show his prior equity. He must show that the mortgagee had notice of such prior equity, before advancing the consideration for the mortgage.

The possession which will avoid a deed for champerty must be under claim of a title adverse to that of the grantor, in the deed sought to be avoided.

A cestui que trust cannot claim to hold adversely under his own trustee.

APPPEAL from a judgment entered upon the report of a referee. The action was brought to foreclose a mortgage, dated December 21st, 1860, given by the defendants, Hector McLean and Archibald H. McLean to James Chappell, the plaintiff's testator, to secure him for indorsing for their accommodation two promissory notes, one for \$700 and another for \$2000, which Chappell was obliged to pay and did pay. The answer alleged that at the time of the execution of the mortgage Hector and Archibald H. McLean had no interest in the mortgaged premises, but that the defendant Donald McLean conveyed the mortgaged premises to Hector McLean, in trust, to receive the rents and profits, and apply the same during his life to the grantor's support. The case was referred to a referee, for hearing and decision. On the trial the defendant proved an absolute deed from Donald McLean to Hector McLean, and that the consideration was \$100. He then offered to prove that at the time of the execution of the deed there was a verbal agreement between the grantor and

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grantee that the grantee was to take the deed and manage the premises for the use and benefit of the grantor, and that the grantor remained in possession in pursuance of this agreement. This testimony was excluded, and the defendant excepted. The defendant also offered to show his own declarations after the execution of the conveyance, to the same effect. This also was excluded and an exception taken. After the testimony had been closed for several days, and when the parties met to sum up the case, the defendant asked to recall the witness, and have him further testify as to letters, claimed to be lost between the grantor and grantee. This was refused as opening the case anew upon that subject. The defendant again gave notice of an application to the referee to open the case to let in this evidence, but did not appear to make the application. The defendant now also makes a motion for a new trial, on the ground of newly discovered evidence, being the same evidence offered on the trial.

Scott Lord, for the appellant.

M. S. Newton, for the respondent.

By the Court, E. DARWIN SMITH, J. Upon the facts found by the referee I do not see why the conclusions of law based thereupon were not entirely legitimate and sound. The plaintiff made out a clear case upon his evidence, and the referee finds as matter of fact that the matters set up in the defendant's answer were not established. It follows that as no defense was made out the plaintiff was entitled to judgment for the foreclosure of the mortgage set out in his complaint. It therefore becomes necessary to inquire whether the exceptions to the exclusion of evidence offered by the defendants were any of them well taken. The first exception relates to the evidence offered to prove that the defendant Donald McLean was an illiterate person and had been afraid of being cheated by people, and that at the time of the execution of the deed from him to Hector McLean there was a

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verbal agreement that the latter should take a deed of the premises and manage them for Donald's use and benefit, and he, Donald, should remain in possession in the mean time; that the deed to Hector was executed in pursuance of such agreement; and that Donald had remained in possession ever since the execution of such deed. This evidence was objected to and excluded by the referee. The whole offer, taken together, tended to establish that the defendant Donald McLean was the equitable owner of the premises in question, and that Hector took and held them in trust for his benefit. This offer was doubtless excluded upon the ground that it did not go far enough to displace the plaintiff's equity as a bona fide purchaser of the premises. - Hector was invested with the legal title by the deed to him of the defendant Donald, given in evidence, of the date of June 21, 1844. And being thus apparently upon the face of the record invested with such legal title, he conveyed the same to the plaintiff's testator, for a valuable consideration. To overreach the mortgage to Chappell, which vested him with a legal estate in the premises, the defendant was bound to go further than simply to show his prior equity. He was bound to show that Chappell had notice of such prior equity, before he advanced the consideration for the mortgage; that is to say, before he indorsed the notes of Hector which the said mortgage was given to secure. The rule in equity is that as between two parties having equal equities the prior equity must prevail; but if the party having the subsequent equity clothes himself with the legal title before he has notice of the prior equity, such legal title must prevail. So far as the defendant's offer went it did not propose to show that Chappell had any notice of the prior equity of the defendant Donald McLean when he took his mortgage and incurred the liability it was given to secure. The exception must be considered as though the evidence had been received, and such evidence must in this sense be considered in connection with the other evidence in the cause. And if in connection with such evidence it would have

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made out a defense under the pleadings, it ought to have been received. It appears from the case that evidence was given and received tending to establish the fact that Chappell had notice of this prior equity, and such evidence was controverted, and the issue thus made on the evidence is found by the referee against the defendant. In this view the evidence tending to show the prior equity, thus excluded, would have been of no benefit to the defendant and would not have established a defense. To charge Chappell with notice of the prior equity it was necessary for the defendant to show that he had notice of such prior equity. The argument that he had constructive notice of such equity in the fact that Donald McLean was in possession of the premises fails, for the reason that it is not proved that Chappell knew such fact. In *Grimstone v. Carter*, (3 Paige, 437,) it is held that if the party claiming the prior equity is in possession of the estate, and the subsequent purchaser has notice of that fact, it is sufficient to put him upon inquiry as to the actual rights of such possession, and is good constructive notice of such rights. This is sound law and the settled rule in equity, in such cases. The offer of the defendant did not propose such proof, and the referee having admitted evidence tending to establish such fact, has found that it was not proved. It seems therefore that the defendant was not injured by the exclusion of this evidence; for the proof given assumed the very fact offered to be proved, that Donald McLean had the prior equitable title to the premises in question, and the referee has found for the plaintiff on that issue. This exception, I think, therefore, is not well taken.

The next exception is to the exclusion of the proof tending to show that the defendant Donald McLean was in possession claiming to hold adversely, and it is claimed that the plaintiffs' mortgage was therefore void under the statute avoiding deeds where the grantor is not in possession, and has not been, for one year preceding the making of such deed. (1 R. S. 739, § 148.) This exception is not well taken.

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Donald could not claim to hold adversely under his own trustee. His occupation was like that of a tenant at will. It was not under claim of title adverse to that of his trustee whose title was derived from him. He could not claim adversely to his own title, or the title of Hector derived from him, and under which he had remained and held possession. The possession which avoids a deed for champerty must be under claim of a title adverse to that of the grantor in the deed sought to be avoided. (*Crary v. Goodman*, 22 N. Y. Rep. 170. *Holdridge v. Stiles*, decided by Court of Appeals, Dec. term, 1862, and not yet reported.) Donald McLean could not make any such claim, and the evidence was therefore properly excluded. The evidence of the title papers, claimed to have been destroyed by fire, was properly excluded. It was immaterial in fact, and it was a matter in the discretion of the referee whether he would or would not open the case to receive it. I cannot see that the evidence, if received, would in any degree have varied the case. It was simply additional evidence to establish a prior equity in Donald McLean, which was virtually assumed in the disposition made of the case by the referee as I have stated.

The motion for a new trial, on the ground of newly discovered evidence, should be denied. The evidence offered would be cumulative merely, on the single issue of the prior equity of the defendant Donald McLean. The case presents no basis, that I can see, for a claim that the prior equity of Donald McLean should prevail over the equity of the plaintiffs. Donald McLean conveyed his property to his son for his own use and benefit, and thus enabled him to commit what would be a great fraud upon the plaintiff's testator, if the claim arising upon his equitable title were to prevail over the legal estate acquired by Chappell under the mortgage. A party who enables another to commit a fraud ought rather to suffer the consequences of such fraud than to subject an innocent person, acting in good faith and relying upon the

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evidences of title given by such original owner of the estate, to suffer injury from such fraud.

I think the judgment should be affirmed, with costs.

[MONROE GENERAL TERM, September 7, 1863. *E. Darwin Smith, Johnson and Waller, Justices.*]

PALMER vs. AVERY.

A judgment in favor of the plaintiff in a justice's court, after a trial upon the merits, is sufficient evidence of probable cause to defeat an action against him for malicious prosecution, although on appeal to the county court it is reversed, upon another trial.

It is not however conclusive evidence of probable cause, but may be impeached for fraud, conspiracy, perjury, or subornation.

Where no such evidence is offered to impeach the prior judgment, it is the duty of the court to order a nonsuit. *BACON, J. dissented.*

The plaintiff is not competent to prove by his own oath, against that of the defendant, that the former judgment was obtained against him by the perjury of the defendant, when the question depends upon their credibility as witnesses.

Where two actions have gone down in consequence of the plaintiff's failure to appear before the justice at the adjourned day, and a new action has been commenced before another justice for the same demand, which is still pending, the litigation is not terminated; and want of probable cause cannot be inferred solely from the discontinuance of the former suits. *Per BACON, J. FOSTER, J. concurring.*

Where such new suit, after a full and fair trial upon the merits, resulted in a judgment in favor of the plaintiff, it furnishes sufficient evidence of probable cause to defeat an action brought by the defendant therein against the plaintiff, for malicious prosecution of the prior suits. *Per MORGAN, J. FOSTER, J. concurring.*

ACTION for malicious prosecution. The action was commenced April 14, 1862. At that time an action was pending in a justice's court, in which Avery was plaintiff and Palmer was defendant, for the same demands which had been in issue in two former suits commenced by Avery against Palmer, both of which had gone down in consequence of the

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failure of Avery to appear on the adjourned day. The third and last suit was tried before Cornelius Mogg, Esq. a justice of the peace, on the 3d day of January, 1862, and Avery obtained a judgment for one hundred dollars damages. Both of the parties were witnesses upon the trial. Palmer appealed to the county court, and the cause was tried there December 2, 1862, and Palmer obtained a verdict in his favor. Both parties were witnesses in the county court. Thereupon Avery appealed to the supreme court from the judgment in the county court, which appeal is still pending.

This action was tried before MORGAN, J. and a jury, at the Onondaga circuit, in February, 1863, where both parties were again the principal witnesses touching the existence and validity of the demands in controversy. The evidence as to the nature of these demands sufficiently appears in the opinion of the court. At the close of the evidence the defendant moved for a nonsuit upon the following grounds: First. Because the defendant had shown probable cause of action against the plaintiff, by the record showing a judgment in favor of the defendant against the plaintiff in the justice's court. Secondly. Because the litigation was not terminated in favor of the plaintiff when this action was commenced.

The judge nonsuited the plaintiff, holding that the judgment of the justice was *prima facie* evidence of probable cause in favor of the defendant, without passing upon the other question. The plaintiff excepted. The plaintiff then claimed that the question of probable cause, upon all the testimony in the case, should be submitted to the jury as a question of fact. This was declined, and the plaintiff excepted. The court ordered the exceptions to be heard, in the first instance, at the general term.

W. C. Ruger, for the plaintiff. I. The court committed an error in holding that the judgment of the court below was *prima facie* evidence of probable cause, and nonsuiting the plaintiff. The case then showed that the judgment was re-

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covered upon the uncorroborated evidence of the plaintiff therein, upon this testimony, viz: 1. That he had sold his interest in a certain canal contract to the defendant for \$100. 2. He also testified that he had prescribed as a physician for the defendant twice, and that the services were worth \$10. When the nonsuit was ordered it appeared, (1.) That the claim when first made was for medical services rendered to a friend of the defendant, \$92. (2.) The plaintiff in this suit solemnly denied under oath the truth of the evidence upon which said judgment was rendered. (3.) The testimony of the plaintiff below was improbable and unnatural. (4.) The verdict of a jury and a judgment thereupon had conclusively stamped the evidence of the then plaintiff as untrue, and precluded him from alleging its truth in any subsequent litigation between the same parties. (*Probable cause defined, Foshay v. Ferguson, 2 Denio, 617.*)

In the English courts it is no unusual thing to have the complaint charge that a conviction of the plaintiff was procured by the defendant with malice and without probable cause. (26 *Eng. Law and Equity Rep.* 381. 30 *id.* 115. 1 *B. & Ad.* 125.) It was held in 2 *Crompton & Meeson*, 675, that an action for malicious prosecution could not be maintained, because the conviction on the prosecution complained of had not been appealed from and reversed. When a judgment has been obtained chiefly upon the evidence of the plaintiff and such judgment has been reversed, an action for malicious prosecution will lie upon proof that the evidence of the plaintiff was false. (2 *Shep.* 362. 9 *id.* 212.) A conviction before an examining magistrate, when the defendant was afterwards acquitted on the trial, was held to be no evidence of probable cause. (*Ash v. Morton*, 20 *Ohio Rep.* 119. *Ewing v. Sanford*, 19 *Ala. Rep.* 605.) A conviction before a magistrate, afterwards reversed, was held to be only evidence of probable cause, entitled to "great consideration." (*Goodrich v. Warner*, 21 *Conn. Rep.* 433.) The law in this state is settled by *Burt v. Place*, (4 *Wend.* 591,) in which it is held

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that an intermediate judgment in favor of the plaintiff is only *prima facie* evidence of probable cause, and may be rebutted.

II. The other grounds taken upon the motion for a nonsuit were not well founded. The jury could have found the fact of malice, from the want of probable cause. (19 *Wend.* 417.) The point, that the litigation was not terminated, is not well taken; it was only necessary that the particular suit complained of should be terminated. (*See* 6 *Hill*, 344.)

D. Pratt, for the defendant. I. The plaintiff, to sustain his action for malicious prosecution, was bound to establish these three propositions: (1.) That the prosecution against him had terminated in his favor. (2.) That there was no probable cause for the prosecution. (3.) That the prosecution was malicious. A failure to establish either of these propositions would defeat the action.

II. The plaintiff failed to establish, upon the trial, either of these propositions. (1.) The prosecution against him had not terminated in his favor at the time of the commencement of this suit. (a.) Although two actions had become discontinued in consequence of his failure to appear upon the trial, yet another action had been commenced, and was then pending, for the same cause, which afterwards terminated in Avery's favor. (b.) The plaintiff must aver and prove that the prosecution claimed to be malicious has terminated in his favor. The proceedings must be so disposed of that it cannot be revived. (*McCormick v. Sisson*, 7 *Cowen*, 715. *Gorton v. DeAngelis*, 6 *Wend.* 421. *Godard v. Smith*, 6 *Mod.* 261. 2 *Salk.* 21.) (c.) No case can be found in the books where an action for malicious prosecution has been sustained, while a prosecution for the same matter was pending. (2.) The plaintiff failed to prove a want of probable cause. (a.) Want of probable cause cannot be inferred from the discontinuance of the suits, in consequence of the failure of Avery to appear. (*Gorton v. DeAngelis*, 6 *Wend.* 418.)

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Roberts v. Bayles, 1 Sand. 47.) (b.) The testimony taken before Justice Mogg, and the judgment therein, being put in evidence by the plaintiff, became evidence as well for as against the defendant. (*Scott v. Simpson*, 1 Sand. 601.) (c.) Taking then the whole testimony together, it showed a clear case of probable cause. (1.) It is plain that Avery was interested in the canal contract, at the commencement of the work, and subsequently ceased to have such interest. (2.) He received none of the proceeds at the final settlement. (3.) Palmer fails to explain how he was got out of that contract. (4.) These circumstances, with Avery's testimony, with nothing but Palmer's naked assertion on the other side, each warranted the decision of the justice. (d.) At most it presented a doubtful case, and a doubtful case is not sufficient to establish a want of probable cause. (e.) Besides, Avery was advised by his counsel that he had a good cause of action, which is a sufficient justification. (*Hall v. Suydam*, 6 Barb. 83.) No malice is proved. From all the circumstances of the case it is clear that Avery supposed he had a cause of action against Palmer, which he was trying to enforce.

III. (1.) It is not material that the nonsuit was put upon the ground that the proceedings before the justice showed *prima facie* probable cause. (a.) The proceedings before the justice constituted all the evidence there was of a want of probable cause. (b.) The plaintiff's testimony on the trial of this suit was merely a reiteration of that given by him before Justice Mogg. (2.) The fact that the prosecution was not terminated when this suit was commenced, could not have been changed.

IV. The court was clearly right in refusing to submit to the jury the question of probable cause. That is a question always for the court to decide. (7 Cowen, 715. 1 Wend. 345. 2 Seld. 384.) (a.) There was no question of fact for the jury to pass upon. (b.) Besides, the plaintiff did not ask that any question of fact be submitted, but simply that the question of probable cause be submitted to the jury.

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MORGAN, J. The case shows that the defendant preferred claims against the plaintiff for medical services, and also for \$92, balance alleged to be due on a sale by the defendant to the plaintiff of his interest in a canal contract; that he sued the plaintiff once before J. Hurst, Esq., a justice of the peace of the city of Syracuse, and that his attorneys declared only for the balance due on the canal contract; that issue was joined (Palmer appearing in person, and Avery not appearing except by attorney,) that Avery did not appear on the adjourned day, and the suit went down; that Avery again sued him before J. Durnford, Esq., of Syracuse, and declared for medical services only, and issue was joined and the suit adjourned; that both parties took out subpoenas, and that Avery's subpoena was returnable at a later hour than the time specified for the adjournment; that Palmer appeared in time, and that the suit was dismissed before Avery arrived. That Avery afterwards sued Palmer before Cornelius Mogg, Esq. of Clay, and declared for medical services and for balance due on the canal contract, and the cause was tried upon its merits, both plaintiff and defendant being sworn as witnesses; that Avery recovered judgment before the justice for \$101.71, damages and costs; that Palmer appealed to the county court, where a new trial was ordered, and that both parties and witnesses were again sworn, and Palmer obtained a verdict; that exceptions were taken on the trial in the county court, by Avery's counsel, and the judgment appealed to the supreme court, where the appeal is still pending.

This action is brought for a malicious prosecution, growing out of the above suits; and on the trial the defendant moved for a nonsuit on the following grounds: *First.* Because the defendant had shown probable cause by the record of the trial and judgment before Justice Mogg: And *secondly.* Because the litigation was not terminated.

Without passing upon the other question, I held at the circuit that the judgment before Justice Mogg was *prima facie evidence* of probable cause, and nonsuited the plaintiff. The

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plaintiff's attorney claimed that the question of probable cause, upon all the testimony, should have been submitted to the jury. This was declined. The defendant's counsel insists that the litigation was not terminated, and for that reason the nonsuit must be sustained, without reference to the ruling of the court, placing it upon another and untenable ground. And doubtless he is right, if the objection is one which could not be obviated. (*Munro v. Potter*, 34 Barb. 358.)

I have not examined the question as to the termination of the suit, and do not propose to discuss it in this opinion. It is said by the plaintiff's counsel that it is sufficient that the particular suit is ended which is alleged to be malicious. If this should be conceded I am of opinion that the commencement of a new suit, if it is fairly prosecuted to a trial upon the merits, and results in a judgment in favor of the plaintiff therein, would be a good answer to an action for malicious prosecution. Without, however, dwelling upon this point, I proceed to notice what I deem a much more important question, viz: whether an intermediate trial and judgment in favor of the plaintiff below, is not sufficient evidence of probable cause, in the absence of fraud, conspiracy or subornation in the procurement of the judgment. Although the ruling at the circuit speaks of such a judgment as *prima facie* evidence, I think it would be more accurate if I had ruled that it is *sufficient* evidence of probable cause not to be overcome by a new trial upon the merits, although resulting in a verdict and judgment for the plaintiff. In this case two trials have been had upon the merits, both parties and their witnesses having been sworn on each trial. There was no evidence offered to show that the first trial had not been as fair in all respects as the second one. The result in each case depended upon the credibility of the same witnesses and the nature of the demands. There was nothing in the nature of the demands to show that Avery did not believe they could be sustained at law, if founded on fact. It would not, I

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think, be evidence of want of probable cause if it should be held that the claim for balance due on the canal contract was void within the statute of frauds. That statute is a defense, and would not, I think, render the claim itself a groundless one, so as to subject the party making it to an action for malicious prosecution. It might be otherwise if the party making it had been fully advised that it could not be enforced by a suit. I should be unwilling to hold that a man who is not a lawyer is bound at his peril to know whether or not his demand can be successfully defended either on the ground of the statute of frauds, or on the ground of usury or some other merely technical ground. It is very often a question of nicety, upon which the courts disagree, whether or not a claim comes within the statute of frauds. My own opinion is that the claim of Avery for moneys due him on sale of his interest in the canal contract is within the statute of frauds. It is by no means certain that my brethren will agree with me in this conclusion. Certainly, then, Avery ought not to be deemed to know that it was within the statute. I shall therefore venture to assert that there was nothing in the nature of the demands preferred by Avery against Palmer which furnishes evidence of a want of probable cause. Nothing of the kind was insisted on upon the trial.

The case then comes back to this. Avery succeeded upon a trial before a court of competent jurisdiction in sustaining his demand. It was a trial substantially upon the same testimony as was afterwards introduced by the parties before the county court, where he was defeated. I held at the circuit that the first judgment was evidence of probable cause, and that it could not be overcome by another trial and a different result upon substantially the same evidence. The evidence of the main witness, Avery, may have been somewhat shaken by what was offered by way of contradictory declarations; but nothing occurred to show that the case materially differed from what it appeared on the former trials.

In this state of the case I was asked to submit the question

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- of probable cause to the jury. The request does not raise the precise point argued by the plaintiff's counsel; but I think he should have the benefit of it, notwithstanding.

If any of the facts necessary to the decision of the question of probable cause depended upon conflicting evidence, the case should have been submitted to the jury; otherwise not. I intended to rule broadly, that upon the undisputed facts of the case, the action could not be maintained, for the reason that the defendant had once obtained a judgment for his demand before a competent court, after a full and fair trial upon the merits. I did not intend to rule that such a result could not be avoided by proper evidence; but I held in effect that no such evidence had been produced. Hence I said that the intermediate judgment was *prima facie* evidence of probable cause—and of course sufficient, unless rebutted, to destroy the plaintiff's case. Now it will not be argued that there was any reason given on the trial of this action why the judgment before Esquire Mogg should not have its legitimate effect as evidence of probable cause. If I had submitted the case to the jury they would necessarily have passed upon the same evidence as was passed upon in the two former trials. True, the jury might have disbelieved Avery and his witnesses, and might have believed Palmer and his witnesses. In that respect they would have differed from the justice on one trial and agreed with the jury on the second trial, in the county court. Could the effect of the judgment before Esquire Mogg be overcome in this way? This is the only question involved in the plaintiff's exception. We may lay out of view the fact that there is perhaps some evidence that the plaintiff below was actuated by malicious motives in commencing his action; but malice is no ground of action, unless the suit was also commenced without probable cause. And want of probable cause cannot be inferred from any degree of malice. (*Besson v. Southard*, 10 N. Y. Rep. 236.) Having thus cleared the way of all obstacles I propose to examine the question whether an intermediate trial upon the

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merits, in a court of competent jurisdiction, resulting in a judgment in favor of the claim of a party, is not sufficient evidence of probable cause, although upon appeal another jury come to a different conclusion upon a new trial in the same action. This question is not a new one, but must, I think, be determined by the authorities. The principal authority in this state is the labored opinion of Marcy, J. in *Burt v. Place*, (4 *Wend.* 591.) The case itself holds that an intermediate judgment in favor of the defendant is *not conclusive evidence of probable cause*, but may be overcome by evidence showing that the complainant caused the defendant to be unjustly detained in prison to prevent a defense in a case where the complainant knew that he had no cause of action. Judge Marcy says, (p. 600,) "If we look beyond the declaration to the evidence we see an iniquitous abuse of the process of the law to accomplish an illegal purpose." The opinion of Judge Marcy is mainly devoted to qualifying the rule announced in *Whitney v. Peckham*, (15 *Mass. Rep.* 143,) which he claimed went too far, in holding that the recovery before the magistrate was *conclusive* evidence of probable cause. I have looked into that case, and find the doctrine announced as broadly as it is stated by Judge Marcy; but the case itself was not one where the court was called upon to qualify it. No evidence was offered to show that the conviction before the magistrate had been unfairly obtained; but it appeared that on an appeal to the common pleas, the defendant below was acquitted. Thereupon he brought his action for malicious prosecution. Upon this statement the judge at the circuit held that the first conviction was conclusive evidence of probable cause, and nonsuited him; and the point being reserved for the opinion of the whole court, the nonsuit was confirmed. Without doubt this decision fully authorizes the ruling at the circuit, in the case at bar. But the authority of that case has been questioned, and it therefore remains to consider whether it has been overruled. Now it will be admitted that the doctrine announced by the court

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in that case may have been too broad, and yet the case itself correctly decided. So far as the case holds that the former conviction was *sufficient* evidence of probable cause in the first instance, it is sustained by the remarks of Judge Marcy, in *Burt v. Place*. In discussing this question, Judge Marcy refers to *Reynolds v. Kennedy*, (1 *Wils.* 232,) and the comments of different judges as to the rule there established; and he observes: "Taking the case as presented by the report, and as explained by the learned judges to whom I have referred, it seems to be no more than this; that if it appears by the plaintiff's own declaration that the prosecution which he charges to have been malicious, was before a tribunal having jurisdiction, and was there decided in favor of the plaintiff in that court, *nothing appearing to fix on him any unfair means in conducting the suit*, the court will regard the judgment in favor of the prosecution as *satisfactory* evidence of probable cause. The question seems to have been what was *sufficient*, rather than what was *conclusive* evidence of probable cause." It is submitted that sufficient evidence becomes conclusive evidence of probable cause, in the absence of testimony that the former judgment was obtained by unfair means; and that the criticism of the learned judge upon the case of *Whitney v. Peckham* is not fully warranted by the decision. *Whitney v. Peckham* was followed by the same court in *Cloon v. Gerry*, (13 *Gray*, 201,) and the rule there announced is, that a conviction by a justice of the peace in a case within his jurisdiction, is *sufficient* evidence of probable cause to defeat an action for malicious prosecution. Chief Justice Shaw, in delivering the opinion of the court, observed: "Where the plaintiff had been convicted by a tribunal constituted by law, with authority to render a judgment, which if not appealed from would have been conclusive evidence of his guilt, and such judgment is not impeached on the ground of fraud, conspiracy, or subornation in its procurement, although afterwards reversed on another trial, it constitutes sufficient proof that the prosecution was not

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groundless, and to defeat an action for malicious prosecution." There was a nonsuit granted by the judge on the trial as in the case at bar, and for the same reason. The chief justice further observes: "It is said the question of probable cause is a mixed question of law and fact, and that the facts should have been left to the jury. Here no fact *material to the question* was controverted, and there was nothing to leave to the jury." Now it will be seen that *Cloon v. Gerry* expressly affirms the decision of the same court in *Whitney v. Peckham*—while Chief Justice Shaw, in delivering the opinion, qualifies the doctrine of that case as insisted on by Judge Marcy in *Burt v. Place*. I think, therefore, it may be safely assumed that all these cases agree in holding, that in an action for malicious prosecution, a prior judgment in favor of the plaintiff below, after a trial upon the merits, in a court of competent jurisdiction, is sufficient evidence of probable cause; and unless an attempt is made to impeach it, for fraud, or conspiracy, or subornation, it is the duty of the court to grant a nonsuit. In *Payson v. Caswell*, (22 *Maine Rep.* 212,) it was held that a former conviction, unless obtained by undue means of the prosecutor, was *conclusive* evidence of probable cause. The court in commenting upon *Burt v. Place*, (4 *Wend.* 591,) say: "The entire universality of the rule was very properly questioned (in that case;) and it was held that where the conviction in the inferior court was procured by the circumvention and fraud of the defendant, it should not avail him." An instance is there given where the universality of the rule was qualified, in *Witham v. Gowen*, (14 *Maine Rep.* 362,) and where it was said that a conviction obtained by false swearing would not be conclusive evidence of probable cause. In that case it seems the plaintiff was nonsuited on production of a former record, showing that he was convicted before a justice of the peace, but that on appeal to the court of common pleas he was acquitted. The judge, on the trial, ruled that the conviction was conclusive proof of probable cause, unless the

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plaintiff could prove that the conviction before the justice was obtained exclusively, or mainly, upon the testimony of the defendant, and that such testimony was false. This ruling was held correct by the supreme court, and a new trial denied. In *Ash v. Marlow*, (20 *Ohio Rep.* 119,) it is announced that proof that the examining magistrate bound the accused over to court is not conclusive evidence of probable cause. But the court in deciding that case observe: "The cases cited distinguish in unequivocal terms between the judgment of a court of final jurisdiction, and the binding over by an examining court." So far as it bears upon the question involved in the case at bar, it may be cited as an authority for upholding the nonsuit; for the judge in delivering the opinion of the court cites, without disapproval, the case of *Whitney v. Peckham*, (15 *Mass. R.* 243.) And *Ewing v. Sanford*, (19 *Ala. R.* 605,) is of the same character. The judge in the latter case, in delivering the opinion of the court, however, observes: "In many cases this commitment (of the magistrate) is predicated alone upon the information of the prosecutor, which information the declaration charges to be malicious and unfounded. To hold that the action of the magistrate, which the prosecutor thus superinduces by his malicious and false charge, should protect him against liability to the injured party, would be to allow him to take advantage of his own wrong."

I will now notice the case of *Goodrich v. Warner*, (21 *Conn. Rep.* 432,) cited by the plaintiff's counsel. It was an action for slander and also for malicious prosecution, for that the defendant had falsely charged the plaintiff with having committed an assault and battery upon him, causing him to be arrested and carried before a magistrate, and there he became bound with surety for his appearance before the county court, when upon a trial before a jury he was acquitted of the charge. On the trial it was admitted that the plaintiff was found guilty before the magistrate, and that he appealed to the county court and was there acquitted by the verdict of a

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jury; and it was claimed by the defendant that such conviction was conclusive evidence of probable cause; and by the plaintiff that it was only *prima facie* evidence. The court instructed the jury that it was not conclusive evidence of probable cause, but if the trial was full and fair it was entitled to "*great consideration*." The jury having returned their verdict in *favor of the defendant*, the plaintiff moved for a new trial. It may be remarked that the plaintiff's counsel on the argument of this motion, found it necessary to retract his concession on the trial that the former conviction was only *prima facie* evidence of probable cause, and to insist that by the appeal to the county court and acquittal it had become dead, effete and inoperative. After this statement, it will be unnecessary to look into the opinion of the court any further than to see that a new trial was refused, thus giving effect to the prior conviction as *prima facie* evidence of probable cause. The reporter in his head note uses the language of the judge on the trial, that the prior conviction was entitled to "*great consideration*." As the jury, however, found a verdict for the defendant, the correctness of this language was not affirmed by the appellate court.

After this examination of the authorities, I think we may with propriety notice a single element in the case at bar which did not exist in the cases cited. In *Cloon v. Gerry*, (13 Gray, 202, 3,) Shaw, Ch. J. lays stress upon the fact that the defendant was not a witness on the first trial. In *Ewing v. Sanford*, (19 Ala. Rep. 609, 10,) the judge clearly intimates that a commitment by an examining magistrate, procured by the oath of the complainant, might be overcome by evidence showing that he swore falsely to the information. Without dwelling longer upon this branch of the inquiry, I am ready to accede to the proposition that a conviction or judgment procured solely by the false oath of the complainant, is not sufficient evidence of probable cause. It then falls within that class of exceptions to the general rule, where the former judgment has been procured by perjury or subornation, or by

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fraud and circumvention. It will be observed that the defendant in this action was the principal witness to support his demand before the justice as well as in the county court. So far then it appears that the judgment before Esq. Mogg was obtained principally upon the evidence of the defendant. But I am of opinion that the judgment there cannot be overcome by the plaintiff's interposing his own oath at the circuit to contradict him. He had the advantage of giving in his evidence before the justice, and was upon equal terms with the defendant. When both parties are allowed to testify as witnesses before the justice, there is no reason or authority for allowing the plaintiff to overcome the effect of a judgment against him as evidence of probable cause by appealing to another jury to credit his oath instead of that of the defendant. Without attempting to show that the defendant's oath was false by any new testimony, the offer is to falsify it by his own oath. But he had that opportunity in the justice's court. Is it after all any thing more than a case of conflicting evidence, where two tribunals have come to a different conclusion upon the credibility of the principal witnesses? I think not; and since parties are witnesses in civil actions, they cannot be admitted to contradict each other in successive courts for the purpose of showing that a suit was commenced by one against the other without probable cause. Without doubt there will be many cases of hardship where it will be impossible to redress the wrongs of those against whom judgments are obtained upon the false testimony of one of the parties. But the difficulty of ferreting out perjury in such cases is inherent in the law itself which allows parties to be witnesses in their own behalf. There is no known method by which one jury can determine with any thing like absolute certainty that another jury was mistaken in their verdict, when that verdict depended upon the credibility of the parties as witnesses. As one party is not competent as a witness to convict the other party of perjury by his single oath, so he is not competent, I think, by his own oath, to prove that his adver-

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sary obtained a judgment against him by false swearing ; especially in a case where both parties are witnesses. I am of opinion, therefore, that the motion for a new trial should be denied.

BACON, J. I have no doubt of the legal soundness of the ruling of the learned justice on the trial, that a record which showed a judgment rendered by a justice of the peace against the plaintiff in this suit was *prima facie* evidence of probable cause. The cause of action in the third suit, tried before Justice Mogg, was identical with the suits commenced before the other parties, and which went down or were discontinued by the failure of the plaintiff in those suits to appear upon the respective adjourned days. But having made this ruling, it was as it seems to me, erroneous to nonsuit the plaintiff upon that ground. In order to produce this result it was necessary to hold that the recovery of that judgment was *conclusive* evidence of probable cause, not capable of being contradicted, and which no evidence that was, or might have been given, could overcome. The same question, in this aspect of the case, was presented on the trial in *Burt v. Place*, (4 *Wend.* 591.) The defendant in that case had prosecuted several suits before a justice against the plaintiff, and obtained judgments in them all. Upon an appeal to the court of common pleas, all these judgments were reversed, and the plaintiff had final judgment in his favor. Upon the trial the defendant moved for a nonsuit on the ground that the judgments obtained by him before the justice were conclusive evidence of probable cause. The judge held that they were not conclusive, but only *prima facie* evidence of probable cause, and denied the motion for a nonsuit. To overcome the presumption arising from the recovery of the judgments, the plaintiff was not only permitted to show the reversal of those judgments on appeal, but the conduct of the defendant in prosecuting those suits, and the baseless character of the

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claims on which they were founded, as well as declarations of the party showing the motive by which he was actuated.

So in this case it was right to hold that the recovery of the judgment was *prima facie* evidence of probable cause, and the defendant started with that presumption in his favor, which it was the business of the plaintiff, if he could, to overcome. Such evidence it was claimed he had given, and therefore the plaintiff's counsel insisted that all the testimony in the case should be submitted to the jury for their decision as a question of fact. This, I think, was his right, and consequently the ruling by which the court declined thus to submit the question was erroneous.

If this were all of this case it would be necessary to reverse the judgment, and send the cause back for a new trial. In this action, however, it is necessary in order to recover, for the plaintiff to show that the prosecution which is claimed to be malicious, has terminated in his favor. (*McCormick v. Sisson*, 7 Cowen, 715. *Clark v. Cleveland*, 6 Hill, 344.) Such was the fact also in *Burt v. Place*, in which case final judgment had been rendered in favor of the plaintiff, in the court of common pleas. In the case it is stated that this suit was commenced on the 14th of April, 1862. At that date the action between the parties was pending before Mogg, and the trial did not take place until July, 1862. The action would therefore seem to be premature. On the trial of this cause the plaintiff showed a reversal of that judgment, and a judgment in his favor on appeal to the county court, but at the same time it was conceded that an appeal had been brought, and was then pending and undetermined upon that judgment. So that the litigation was not ended; and no final judgment had been entered putting an end to the prosecution. The court, in the opinion in *Burt v. Place*, say that the appeals "were further proceedings in the same suits," and it was only the judgment ultimately rendered that satisfied the rule of law that requires that the suits alleged to be malicious should be decided in favor of the plaintiff. In like manner,

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the appeal taken and then pending in the same action was a further proceeding therein, and until that was ended, the controversy had not terminated in favor of the plaintiff. This objection was taken by the defendant's counsel, but not passed upon by the court, which placed the decision upon the other ground. But the fact upon which the objection proceeded exists, and cannot by any possibility be changed; and if it is fatal to the recovery, as I think it is, it would be idle to send this case back for a new trial.

My opinion consequently is that the judgment in this case is right, and should be affirmed.

FOSTER, J. concurred with Justice BACON in the opinion that the litigation was not terminated, and was in favor of a denial of the motion, upon both grounds.

New trial denied.

[ONONDAGA GENERAL TERM, April 5, 1864. *Moffan, Bacon and Foster, Justices.*]

RANSOM and others vs. VAN DEVENTER and others.

A division by partners, of the copartnership assets between themselves, and the transfer of such assets by the individual partners in payment of their private debts, when the partnership is insolvent, is in point of law a fraud upon the creditors of the partnership.

Such a transfer of the partnership effects is invalid, as against the creditors of the firm, and the property remains partnership property until it comes to the hands of a *bona fide* purchaser for a valuable and new consideration. If the person to whom the property is transferred has notice that it is partnership property, and he takes it in payment of a precedent debt, he will not be deemed a *bona fide* purchaser.

THIS action was in the nature of a creditor's bill brought by the plaintiffs as judgment creditors of William Van Deventer and Thomas Smithyman, composing the firm of

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Van Deventer & Co., to obtain satisfaction of a judgment in their favor, out of a note for \$1000 given to said firm by A. F. Whitaker, and transferred by William Van Deventer, with the consent of Smithyman, to the appellants, in payment of a debt due and owing by said William to them. William Van Deventer and Smithyman, from December, 1859, to August, 1861, carried on the foundry business, as partners, in the village of Penn Yan, under the firm and name of Van Deventer & Co. On the 3d or 4th of August, 1861, the firm of Van Deventer & Co. sold their real estate and stock in trade to A. F. Whitaker, and for a part of the purchase money, Whitaker executed and delivered to the said firm his three promissory notes: two for \$1000 each, and one for \$700. At the time of the sale to Whitaker, and before the notes were given, it was agreed by and between William Van Deventer and Smithyman, that said William should have one of the notes to be given by Whitaker for \$1000, to be charged to him on the books of the firm, for the purpose of equalizing their individual accounts; Smithyman's account amounting to \$6800, and William Van Deventer's to \$2630. On the 8th of August, 1861, on the notes being executed and delivered by Whitaker, the note in question was taken by William Van Deventer, and charged to himself on the books of the firm, with the consent of Smithyman. On the same day the note in question was transferred by said William to the appellants, in payment and satisfaction of several notes which they held against him, and the notes held by them given up and destroyed. The firm of Van Deventer & Co., as it turned out, was insolvent at the time. At the time the appellants received the note in question, and surrendered up their notes, they did not know, and had no notice whatever that the firm was insolvent or in failing circumstances. On the 25th of October, 1861, the plaintiffs recovered a judgment for \$334.63 against William Van Deventer and Smithyman, for a debt of the firm; upon which execution was duly issued and returned on the 11th of November, 1861, unsatisfied. This

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action was commenced by the plaintiffs, on the 16th of November, 1861, for the purpose of obtaining satisfaction of their judgment, out of the note in question, which had been turned out to the appellants, in payment and satisfaction of the debt due and owing to them by William Van Deventer. The action was tried at a special term held in Yates county, on the 13th of February, 1862. The court, after hearing the proofs and allegations of the parties, held and decreed that the transfer of the note to the defendants was fraudulent and void, as against the creditors of the firm of Van Deventer & Co., and especially as against the plaintiffs in said action, and directed that judgment be entered, appointing a receiver, and that the defendants deliver the note over to such receiver; upon which decision judgment was accordingly entered on the 14th of August, 1862. To this decision and judgment the defendants excepted and made a case containing said exceptions, and appealed to the general term.

D. B. Prosser, for the appellants. The court erred in deciding that the sale and transfer of the note by William Van Deventer, to the appellants, was fraudulent and void, as against the creditors of the firm of Van Deventer & Co., and in giving judgment that the appellants surrender it up to the receiver, &c.; Because, (1st.) The appellants were bona fide purchasers of the note for value, without notice of the insolvency of the firm. The surrendering up of the notes which they held against William Van Deventer, to be canceled, was parting with value, so as to constitute them *bona fide purchasers*, within the strict commercial sense of the term *bona fide purchaser*. (*New York Marbled Iron Works v. Smith*, 4 Duer, 363. *Young v. Lee*, 2 Kern. 551. *White v. Springfield Bank*, 3 Sand. 222. *Small v. Smith*, 1 Denio, 583. *Bank of St. Albans v. Gilliland*, 23 Wend. 311.) (2.) The creditors of the firm had no lien upon the partnership property. While it remained legally under the control of the parties they had a right to sell and dispose of it as they thought proper.

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It would have been competent and legal for them to have divided the whole property among themselves; and in such case an execution against an individual member might have taken the property as individual property. (*Ketchum v. Durkee*, 1 Barb. Ch. 480. *Kirby v. Schoonmaker*, 3 id. 46.) The partners, as such, have a lien upon the partnership property, and may file a bill against the copartners for an account, and marshaling of the assets. *But the creditors at large have no such lien.* Before they can have such lien, they must have judgment and execution. (*Greenwood v. Brodhead*, 8 Barb. 593. *Orippen v. Hudson*, 3 Kern. 161.) (3.) The rule in equity, that partnership property must in the first instance be applied to the payment of partnership debts, *only applies where the partnership property or fund is in court.* (*Ex parte Ruffin*, 6 Ves. 119. *Ex parte Williams*, 11 id. 4.) The lien, in case of partnership, being a lien of the *partners*, and not the lien of the creditors. *That equity being the equity of the partners*, it is fully competent for the partners to waive such lien. In the case now before the court, the lien was clearly waived by Smithyman, he consenting that the defendants should take the note in payment of their demands against his copartner. Smithyman, by his consent, lost all lien and control over the note in question. The defendants' title, as against him, was perfect the moment they obtained possession. The partners having no equity, the creditors have none. (3 *Kent's Com.* 65, 7th ed. 78. *Rice v. Barnard*, 20 *Verm. Rep.* 479. *Rees v. Bradford*, 13 *Ala. Rep.* 837. *Sage v. Chollar*, 21 Barb. 598.) (4th.) The title to the note in question having absolutely vested in the appellants, without any fraud on their part, long before the plaintiffs obtained their judgment, there was not any right to or interest in the note remaining in the partners, or either of them, upon which their judgment could attach. The defendants, by receiving the note in question in payment of the notes held by them against William Van Deventer, acquired the same right thereto as they would to the money, if the note

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had been sold by him, and the money paid them in satisfaction of their demands.

S. H. Welles, for the respondents. The judgment is correct and should not be disturbed. At the time Van Deventer & Co. sold out to A. F. Whitaker, the firm was insolvent to between \$4000 and \$5000; and from the time of such sale the firm has not done any business as a firm. It is well settled that a partnership cannot make an assignment preferring the debts of the individual members of the firm. Such an assignment has been held to be void, and a fraud upon the firm creditors. (*Wilson v. Robertson*, 21 N. Y. Rep. 587.) It will be claimed, or was in the court below, that the case just cited differs from the one at bar, in that in the present case there is no assignment, and that while the firm are engaged in business either member has a right to use the partnership effects in any way he chooses. This may perhaps be true while the firm is perfectly solvent, and the claims of creditors not prejudiced. The facts in this case show, that at the time of the transfer of the note in question the firm of Van Deventer & Co. was insolvent to over \$4000, and had in fact sold out and thereby, by operation of law, was dissolved. The sale to Whitaker was made on the 3d or 4th day of August, and the transfer of the note in question was about the 8th of August. It could not have been previous to the 8th, because the note was not executed until that day. Where a firm is insolvent, any appropriation of any part of the firm funds to pay a debt of an individual member is absolutely void as against creditors of the firm, and the property may be reached in the hands of the person to whom it is thus transferred. The funds of a copartnership belong to the firm to the extent of its liabilities, and in case of insolvency the primary distribution of the property should be made to the joint creditors, in preference to the creditors of the partners individually. Members of an insolvent partnership cannot by mutual consent divide the partnership funds between

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themselves, so as to enable each member to apply the part allotted to him in payment of his separate debts, leaving the firm debts unsatisfied. In *Burtus v. Tisdall*, (4 Barb. 571,) on page 588, the following language is used by the court: "It was contended on the argument, that copartners have a right to appropriate, by mutual consent, their joint property to the payment of debts owing by them individually, leaving those of the partnership unsatisfied. This may be true where the firm is solvent and sufficient is left to satisfy the joint debts. * * * But the rule in England in cases of bankruptcy is uniform, that the primary distribution must be made to the joint creditors. I cannot see why the same practice should not prevail in this state in cases of insolvency. It would be manifestly just, and in accordance with well settled principles. The funds of the partnership belong to the firm to the extent of its liabilities. * * * It is clearly settled that the joint creditors have then the first equitable claim upon the whole for the satisfaction of their debts." Joint creditors of a partnership in case of insolvency, are deemed in equity to have a right of priority of payment before the private creditors of any separate partner. (*Story's Equity Juris.* § 1253. *Buchan v. Sumner*, 2 Barb. Ch. R. 165. *Kirby v. Schoonmaker*, 3 id. 46.) Whether Van Deventer & Co. knew that they were insolvent at the time or not is of no consequence. The question is, were they insolvent? This William Van Deventer expressly swears to. Even if knowledge of insolvency on the part of Van Deventer & Co. was necessary, the evidence fully shows that they must have known it. Van Deventer swears as follows: "That" (the note in question) "was one of the notes we took from Whitaker on the sale of the property of Van Deventer and Company; it was the closing up of the sale; on that day the sheriff had executions against the firm for \$1200 or \$1500." Again: "He," (that is Stephen W. Van Deventer, one of the defendants here,) "was on our paper for \$3000 or \$3400, and firm owed him from \$3200 to \$3500." Van Deventer

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knowing these facts, and selling out under the circumstances, must have known that the firm was insolvent.

By the Court, E. DARWIN SMITH, J. The judgment in this case was obviously based upon the principle that the joint creditors of a copartnership are entitled to priority of payment from its assets, before the private creditors of any of the separate partners. This is the settled rule in bankruptcy and in equity, where courts of equity have acquired control of the assets of a copartnership. Chancellor Walworth states the rule with much carefulness and precision in *Kirby v. Schoonmaker*, (3 Barb. Ch. R. 49,) as follows: "Where a partnership is dissolved by the death of one of the copartners, or where one or both of the copartners become bankrupt, or they are discharged under the insolvent acts, so that their property is placed in the hands of the assignees appointed by law to make distribution thereof, it is administered in courts of equity by applying the copartnership funds in the first place to the payment of the debts of the firm, and the individual funds of the several copartners to pay their individual debts respectively, before paying joint debts out of the same." But when the copartners are administering their own funds the copartnership creditors have no lien upon the private funds, nor have the individual creditors any lien or priority of claim upon the separate funds of the debtors. The rule is sometimes stated as though the right of the copartnership creditors was in the nature of a lien, and attached as such to the partnership assets. But this clearly cannot be maintained. Partnership creditors at large have clearly no more lien upon partnership property than private creditors have in respect to the separate property of the individual partners. This can scarcely be pretended while the property of copartners is in their own possession, before the insolvency of the firm. But every partner has a lien upon the partnership property for the payment of the partnership debts, and for the payment of any balance

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that may be due him after the payment of such debts. It is in respect to this lien, and for the purpose of an accounting between the partners and the adjustment of their affairs, that courts of equity have jurisdiction over cases of partnership; and it is through this lien that the creditors of the copartnership can maintain suits in equity to enforce the right to have the partnership property first applied to the discharge of partnership debts; but independently of this lien of the copartners *inter se*, no suit in equity could be maintained by the creditors of the copartnership to reach and distribute the copartnership effects upon equitable principles. But this is not such a suit. The plaintiffs are judgment creditors of the defendants Van Deventer and Smithyman, with an execution returned unsatisfied, and this action is a creditor's bill to reach the note in question as the property of the copartnership. It is not a suit to enforce any partnership lien, at the instance or with the concurrence of one of the partners; nor is it an action for the benefit of the copartnership creditors, to reach copartnership assets for distribution amongst the copartnership creditors. The question in regard to the promissory note in question in this action is therefore purely one of *title*. The plaintiffs by force of the commencement of the suit and the *lis pendens* thereby created, claim to reach the said promissory note as among the equitable assets of the firm of Van Deventer & Co., and to have acquired an equitable lien thereupon. And they have clearly acquired such lien, if the note at the time of the commencement of such suit was legally or equitably the property of the firm of Van Deventer & Co. From the facts found by the learned judge who tried the cause, it appears that the note was given upon the sale of the partnership property of Van Deventer & Co. That William Van Deventer, one of the firm, was owing on the 8th of August, 1861, to the defendants Jacob and Stephen Van Deventer the sum of \$10,000, for which they held his note, being an individual indebtedness from him to them. That on that day William Van Deventer with

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the consent of Smithyman his partner, took and charged to himself on the books of the firm the note in question, made by A. F. Whitaker for \$1000. That on the same day William Van Deventer turned out said note to the defendants Jacob and Stephen Vandeventer in payment of the debt owing by him to them, and that upon the receipt of the said note for \$1000, Jacob and Stephen surrendered up to the said William the note so held by them against him, which said note was canceled and discharged. That at the time of such transfer of the note Stephen and Jacob Van Deventer had no notice that the firm of Van Deventer & Co. was insolvent, or in failing circumstances; and further, that the note was taken by William and charged to himself on the books of the firm, for the purpose of equalizing their individual account between themselves; Smithyman having drawn out of the firm \$6800 and William \$2630, and that Smithyman put into said firm \$2600, and William Van Deventer had put in \$2200. It further appears that the firm was at the time in fact insolvent, in the sum of from \$4000 to \$5000. Upon these facts, the delivery to the defendants Stephen and Jacob Vandeventer of the note in question clearly transferred to them a perfectly valid title to the note, unless the plaintiffs are entitled to impeach such title on the ground of fraud. It is not pretended, or is not found by the judge who tried the cause, that the transaction relating to the transfer of the note in question to the defendants presents a case of fraud in fact. In the case of *Burtus v. Tisdall*, (4 Barb. 580,) which was a case like this where the partners sold out their assets for promissory notes and divided the notes between them, the decision of the court was put and can, I think, be sustained on the ground of fraud in fact. In that case the debt of the private creditor was impeached, and the case was put upon the ground that it was in fact fictitious, or paid and extinguished before the receipt of the notes turned out to him by one of the partners. No doubt

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could exist in this case, if the debt of William Van Deventer to Stephen and Jacob were fictitious, or previously satisfied, that the transfer of the \$1000 note to pay such debt would be a fraud, and the note in that case would remain partnership property. The division by solvent partners of their assets would be entirely valid, and the transfer by one partner of partnership assets thus acquired to pay his personal debts would also be entirely valid. The question therefore is, and this case turns upon the point, whether the division by partners of the assets between themselves and the transfer of such assets by the individual partners in payment of their private debts, when the partnership is insolvent, is or is not in point of law a fraud upon the partnership creditors. I think it is such a fraud, and that such transfer is invalid as against the partnership creditors; and that the property remains partnership property in such cases, till it comes to the hands of a bona fide purchaser for a valuable and new consideration. In the case of *Burtus v. Tisdall*, (*supra*,) Judge S. B. Strong so asserted the rule. He says insolvent partners should be considered as holding their joint property for the benefit of their joint creditors, and a misappropriation should be deemed in fraud of the implied trust. In the case of *Wilson v. Robertson*, (21 N. Y. Rep. 587,) the court of appeals expressly held, that the appropriation by an insolvent firm of partnership property to the payment of the individual debts of one partner is not simply void, but is fraudulent, and avoids the deed of assignment. This was the case of an assignment in trust for the benefit of creditors. The principle thus asserted covers this case. Judge Wright, in giving the opinion of the court, says: "An appropriation of the firm property to pay the individual debt of one of the partners is in effect a gift from the firm to the partner—a reservation for the benefit of such partner or his creditors, to the direct injury of the firm creditors." In *Kirby v. Schoonmaker*, (3 Barb. Ch. Rep. 51,) Chancellor Walworth says also: "For an insolvent

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copartner who was unable to pay the debts which the firm owed would be guilty of a *fraud* upon the joint creditors, if he authorized his share of the property of the firm to be applied to the payment of a debt for which neither he nor his property was liable, in law or in equity." This would be readily admitted, if the question were unmixed with the question of a partnership consisting of two or more partners. No one would pretend that a single debtor who was insolvent could give away his property in defiance of the rights of his creditors, and to their prejudice. This has been held a fraud as long as there has been any common law. And what is a partnership but a single person in law, having, as such, debts and credits and rights as a single person? The assignment, or transfer without assignment, of the property of an insolvent partnership, is precisely the same violation of the rights of creditors that it would be if it were in fact a single person, and the gift to one of the partners or to his creditors or for his benefit does not vary or affect the principle. It is the giving away in either case of the property of an insolvent debtor at the expense of, and in fraud of the rights of his creditors. We must therefore consider the transfer of the note in question to the defendants as a fraud upon the creditors of the copartnership of Van Deventer & Co., and that the defendants Jacob and Stephen Van Deventer acquired no title thereto as against the creditors of the copartnership, unless they possess the character and are entitled to the protection of bona fide purchasers. Clearly the defendants are not bona fide purchasers or holders of this note. They knew it was given for partnership property, and belonged to the firm. One of the defendants, Stephen Van Deventer, testified that he "heard Smithyman tell his brother that he might take the note and do as he pleased with it. William said he wanted to pay him and his father, and he said he might do so." This was distinct notice that this note belonged to the copartnership. With such notice the defendants could not be *bona fide* holders of the note; and besides, they gave no

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new consideration for it, but simply gave up therefor the notes of William Van Deventer long previously over due. The judgment should be affirmed with costs.

[MONROE GENERAL TERM, September 7, 1868. *E. Darwin Smith, Johnson and Welles*, Justices.]

 HENRY FREELOVE and HANNAH J. FREELOVE *vs.* ALVAH M. COLE.

x

C. having obtained from F. and his wife, without consideration, a conveyance of a farm, upon a parol promise or agreement to take and hold the title until F.'s debts were arranged or paid, and then to convey the land to F.'s wife; *Held* that he could not resist the claim of F. and wife that the parol agreement be specifically executed, on the ground that the conveyance was made by F. to hinder, delay and defraud his creditors; or on the ground that the agreement was within the statute declaring all parol trusts relating to land void.

If parties engaged in the perpetration of a fraud or concurring in the fraudulent purpose, as *particeps criminis*, are *in pari delicto*, neither can have relief, as against the other, at law or in equity.

But as there are degrees of crime and of wrong, the courts can and do give relief in many cases, as against the more guilty party.

To exclude relief, in such cases, the parties must not only be *in delicto*, but *in pari delicto*.

Where the parties to a conveyance did not stand on an equal footing, the grantor being infirm of mind and incompetent to manage his business affairs with ordinary prudence and discretion, and the grantee was his son in law, confidential friend, and legal adviser, and was applied to for advice on this occasion; *Held* that the grantor was not prevented from applying to a court of equity to enforce the performance of a parol agreement by the grantee, to reconvey the premises, although the object and intention of the grantor, in making the conveyance, was to place his property beyond the reach of his creditors; and the conveyance was in fact fraudulent as against such creditors.

Held also, that the grantee, although not in fact a licensed attorney, but only practicing as counsel in justices' courts, was in principle clearly within the rule applicable to attorneys.

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APPEAL from a judgment entered at a special term upon a trial before the court without a jury. The action was brought to compel the defendant to convey a certain farm to the plaintiff, Hannah J. Freelove. The justice found the following facts, viz: That on or about the 15th day of April, 1856, the premises were conveyed by the plaintiffs to the defendant, under and in pursuance of a verbal agreement between the parties that the defendant should take and hold the title to the premises until the debts of the plaintiff, Henry Freelove, could be arranged and paid in some other way, when the defendant should convey the premises to the plaintiff, Hannah J. Freelove, who is the wife of the said Henry; that no consideration was ever in fact paid by the defendant to the plaintiffs, or either of them, in consideration of the said conveyance, all the money which was pretended to be counted out and paid, having been immediately thereafter handed back to the defendant, in pursuance of the original verbal agreement; that at the time of the conveyance, the said Henry was indebted to various persons, and had not the means to make immediate payment in money, and had from some cause become incompetent to manage and conduct his business affairs with ordinary prudence and discretion, and that the object and intention of the plaintiffs in making said agreement and conveyance were to place the premises, for the time being, beyond the reach of the creditors of the said Henry, until the debts could be paid by other means, and without a sacrifice of said premises, and then to have them conveyed to the said Hannah, to be held by her for the use and support of the said Henry and family, and thus protect them not only from the claims of creditors, but from the improvident acts of the said Henry. That the conveyance was in no other respect fraudulent on the part of the plaintiffs. That said agreement was entered into and conveyance made by the plaintiffs at the suggestion and under the advice of the defendant; that it was a part of the arrangement that the plaintiffs should remain in the possession of

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the premises, or in the enjoyment of the rents and profits thereof, which they have continued to do up to the present time. That after the said conveyance, the management and control of the business of the said Henry devolved principally upon the said Hannah, who succeeded in paying off and satisfying all the debts due and owing by the said Henry, at the time of the conveyance, with the exception of one debt, which was partly paid only, but was supposed and believed by the plaintiffs to have been fully paid and satisfied. That afterwards, and some time in the month of July, 1860, the plaintiff, Henry Freelove, requested the defendant to convey the premises to the said Hannah, according to the said agreement, and tendered a deed of conveyance duly made out in conformity thereto, to be executed by him, but the defendant wholly refused to execute and deliver such deed. That after such refusal, the defendant proposed and offered to the plaintiffs, that if they would give him the sum of twenty dollars, in satisfaction of a pretended claim in favor of the defendant's brother, against the plaintiffs, which the defendant had attempted and failed to collect of the plaintiffs by legal proceedings and which was wholly invalid as against the plaintiffs, and leave the said twenty dollars with his, the defendant's, wife, he, the defendant, would execute and deliver the said deed. That in order to obtain said conveyance, the plaintiffs acceded to the said proposition, and delivered the sum of twenty dollars to the defendant's wife, for the defendant, to be delivered to him whenever he should execute said deed, and gave the defendant notice of said payment to his wife. That afterwards the plaintiffs requested the defendant to execute the deed in pursuance of his last promise, and offered him the deed for that purpose, but he wholly refused to execute the same; that the said sum of twenty dollars still remains in the hands of the defendant's wife for his use. The justice found the following conclusion of law from the foregoing facts; viz: that the plaintiffs were entitled to a decree against the defendant requiring him to execute and

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deliver to the plaintiff, Hannah J. Freelove, a conveyance of the premises, without covenants of warranty except as against the acts of the said defendant, but with a covenant of warranty as against such acts; and it was ordered, adjudged and decreed that the defendant execute and deliver such conveyance, and judgment was ordered in the plaintiffs' favor against him for the costs. The justice at special term, placed his decision upon the ground that the second agreement was a valid agreement, founded upon a new and original consideration independent of the original contract, and was in no way connected with, or tainted by it, and had been fully performed by the plaintiffs. The defendant appealed from the judgment.

H. Hakes, for the respondents. I. The defendant is not in a situation to raise the question of fraud. 1. The suggestion to keep the whole of the property and pay nothing to creditors came from the defendant. 2. Whatever there is of fraud and bad faith between the parties in the whole transaction, is exhibited on the part of the defendant. 3. The plaintiffs evinced good faith to the creditors of said Henry Freelove, by answering the suggestion that plaintiffs "might as well save the whole and pay nothing;" that they "wanted to pay *all* debts and save the balance for their family." 4. Paying all the debts save one, and partly paying that, supposing it was all paid, does not show a disposition to cheat or defraud creditors. 5. Bad faith on the part of the plaintiffs toward the defendant cannot be claimed, because they adopted his suggestion and advice in executing a deed of the farm to him, and they paid the \$20 as he required them to do — as a consideration for which he would convey the farm to the plaintiff, Hannah J. Freelove.

II. Courts will not allow one party to retain an unjust and undue advantage over another, which is obtained by superior influence and power, growing out of confidential relations. The rule that courts will not interfere to aid or relieve par-

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ties who are equally guilty of a fraud, does not apply to this case. 1. The plaintiffs applied to the defendant for counsel, and deeded the farm to him as he advised them to do. 2. He was their son in law. The plaintiff, Henry Freelove, could not write to do business and had to get a lawyer to do it, and supposed the defendant knew well enough how to do it. 3. The defendant was a lawyer or pretended to be, and assumed to know the law, and gave counsel to the plaintiffs, to which they yielded, in abandoning their idea of making an assignment, and conveyed the farm to him according to his counsel. He availed himself of the peculiar advantages of his situation, as their chosen adviser, their favored friend and near relative, to perpetrate a cruel fraud upon his confiding and unsuspecting father in law and mother in law. Courts will not sanction such a transaction, but under such circumstances will interpose to relieve the injured party. (1 *Story's Eq. Juris.* §§ 307-310, 314. *Willard's Eq. Juris.* 169-178. *Whelan v. Whelan*, 3 *Cowen*, 537.) And the same doctrine is clearly recognized in *Ford v. Harrington*, (16 *N. Y. Rep.* 285.)

III. Distinct from the original transaction, and some four years subsequent to it, there was a new agreement made, founded upon a new consideration, by which the defendant agreed to convey the farm to the plaintiff, Hannah J. Freelove, if the plaintiffs would give him \$20, or leave that amount with his wife. The \$20 was left with his wife according to the agreement, and the defendant had notice of it. A quit-claim deed, with covenants against the acts of the grantor, was afterwards presented to him to be executed, which he refused to sign. The court has full power to decree a specific performance of a parol agreement to convey lands, where there is a part performance, notwithstanding the statute requiring such agreement to be in writing. (3 *R. S.* 221, § 10, 5th ed. 4 *Sand.* 524. 2 *Story's Eq. Jur.* 77, 78, §§ 760, 761, 5th ed. 3 *Barb. Ch.* 407. 4 *Comst.* 403. *Harris v. Knickerbacker*,

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5 *Wend.* 638.) Justice to the plaintiffs requires this to be done, and in so doing no injustice is done to the defendant.

IV. It is not a harsh nor an unconscionable contract, and the defendant cannot avail himself of the inadequacy of consideration, for the title to the farm is held by him without any consideration, and he received it from the persons who are now asking to have it conveyed to the plaintiff, Hannah J. Free love.

D. Rumsey, for the appellant. I. There is not evidence to warrant the finding of the court that the plaintiff Henry Free love had become incompetent to manage and conduct his business.

II. The original agreement for the conveyance of the land to the defendant, as found by the court, being by parol only, is absolutely void both at law and in equity, as contravening the statute prohibiting the creation of trusts by parol. 1. The conveyance was made to the defendant with the assent of both Free love and his wife, and the statute casts upon the defendant the entire fee. (2 *R. S.* 4th ed. 137, § 51.) (2.) No trust can be set up or sustained as against such title, unless the same is evidenced by some written instrument. It cannot be done by parol. (*Id.* 316, § 6.) The thing sought for by the plaintiffs is the very evil the statute intended to guard against. (3.) It is an effort on the part of the plaintiffs to contradict the deed executed by themselves, and show that it was not intended to convey to the defendant what it purports to do, that is, an absolute fee. The only case where this can be done, is to show the deed was intended as a mortgage.

III. The original agreement, as proved, was also void because it was made with the express intention of hindering, delaying and defrauding the creditors of Henry Free love. The evidence clearly establishes this fact. The court also expressly finds that fact. Such an agreement will never be enforced by the courts. (*Nellis v. Clark*, 4 *Hill*, 424.) It does not aid the plaintiff's case that the court has found that

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another object of the parties to the fraud was to protect the property from the improvident acts of the defendant Henry Freelove. The fraudulent act regarding creditors is fully proved and clearly found, and it cannot be pretended that it was not fraudulent; and where a contract grows out of or is connected with two considerations, one of which is unlawful, the whole is tainted with the illegality, and cannot be enforced. (*Barton v. Port Jackson Plank Road*, 17 Barb. 397. *Burt v. Place*, 6 Cowen, 431. *Pepper v. Haight*, 20 Barb. 429. *Rose v. Truax*, 21 *id.* 361.)

IV. The court was not warranted by the evidence in finding that the defendant made a subsequent agreement to execute and deliver to the plaintiff Hannah "the said deed," if she would pay the \$20.

V. Conceding the subsequent agreement for the payment of the \$20 to have been made, it does not entitle the plaintiff Hannah to a conveyance, because, 1. Standing alone, it is a contract which no court would decree the execution of, even if there was such a part performance as to warrant it. It is a harsh and unfair contract, the transfer of \$2800 worth of property for \$20. The courts never decree a specific performance of a harsh and unreasonable contract. 2. It was a parol agreement void by statute of frauds, and there was no such part performance of it as to warrant a decree for specific performance by the court. Mere payment of the consideration money is not sufficient. (*Story's Eq. Juris.* § 760, 1, and note. *Malins v. Brown*, 4 Comst. 403, per Taylor, J. *Rhodes v. Rhodes*, 3 Sandf. Ch. 279.) Possession, as an act of part performance, must be referable to the agreement, and be taken by virtue of it. (*Jervis v. Smith*, Hoff. Ch. 470. *Smith v. Underdunk*, 1 Sand. Ch. 579.) Here no such possession was taken. Plaintiffs say they always had possession. Defendant says they were tenants by sufferance. At any rate they did not take possession under or by virtue of this subsequent agreement. 3. It was an agreement simply and nakedly to carry out the former illegal contract; is

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between the same parties, predicated upon that, looking to that for its consideration, and in every respect as much illegal as the original contract. It is simply saying, give me a little larger share of the spoils and we will still carry out our original intention of cheating. (*Armstrong v. Toler*, 11 *Wheat*. 258. *Nellis v. Clark*, 4 *Hill*, 144. *Gray v. Hook*, 4 *Coms*. 449. *Barton v. Port Jackson Plank Road*, 17 *Barb*. 397.) The best illustration of this point is that the learned court, in deciding this case at special term, was compelled to resort to the original fraudulent contract to find an apology for making his decision.

By the Court, E. DARWIN SMITH, J. The defendant, upon the evidence and facts found in the case, has obtained from the plaintiffs, without consideration, a conveyance of the plaintiffs' farm, containing about 115 acres, upon a parol promise or agreement to reconvey the same to the plaintiff, Hannah J. Freelove. The defendant having acquired such title, refuses to perform the parol agreement, and resists the claim of the plaintiffs that it be specifically executed, on the ground that such conveyance was made by Freelove to hinder, delay and defraud his creditors, resting his defense upon the maxim "*inter partes in pari delicto, potior est conditio defendentis*;" and also upon the statute declaring all parol trusts relating to land void. It appears that the defendant is a son in law of the plaintiffs; that he was a justice court lawyer; that he was applied to by the plaintiffs for advice, to aid them in the disposition or conveyance of the property, and that the same was conveyed to him, at his instance and upon his advice. The learned judge who tried the cause finds, also, as matter of fact, that the plaintiff, Henry Freelove, at the time of such conveyance, had from some cause become incompetent to manage and conduct his business with ordinary prudence and discretion. The question presented to us is whether a farm, the title to which was acquired under such circumstances, can be retained by the defendant, and

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the plaintiffs be perfectly remediless. I should regret exceedingly to find that the courts were incapable of giving redress in such a case. It would be, in my opinion, quite a reproach upon the administration of justice if such should be the case. The learned judge who tried the cause found that the object and intention of the plaintiff, Henry Freelove, in making the conveyance to the defendant, was to place the premises, for the time being, beyond the reach of his creditors until his debts could be paid by other means and without a sacrifice of said premises, and thereby to hinder and delay his creditors, and then to have the premises conveyed to the said Hannah, to be held by her for the support of the said Henry and the family, and thus protect them not only from the claims of creditors but from the improvident acts of the said Henry; and that the said conveyance was in no other respect fraudulent on the part of the plaintiff. Upon this finding the conveyance was undoubtedly fraudulent as against the creditors of Henry, but as no creditors have sought to impeach it that question is of no importance except as it is presented as a reason why the plaintiffs should have no relief, inasmuch as both they and the defendant were *particeps criminis* in the perpetration of a fraud, or concurred in the fraudulent purpose. If parties in such cases are in *pari delicto* the rule is well settled that neither can have relief, as against the other, at law or in equity. But as there are degrees of crime and of wrong, the courts can and do give relief, in many cases, as against the more guilty party. To exclude relief in such cases, the parties must not only be *in delicto*, but *in pari delicto*. The plaintiffs and defendant did not stand upon an equal footing. The plaintiff Henry was infirm of mind, and the judge finds he was incompetent to manage and conduct his business affairs with ordinary prudence and discretion. The defendant was his son-in-law, a confidential friend and his legal adviser. The plaintiff, Henry Freelove, swears that the defendant was a lawyer, or pretended to be, and tried lawsuits. He was applied to by the plaintiffs to

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befriend and advise them in their trouble, and they acted upon his advice. The judge so finds, as matter of fact. The case is clearly brought within the principle of the exception to the rule that parties shall not have relief as against each other when both are guilty of fraud or crime. They are not in *pari delicto*. I think the case is clearly within the principle of the case of *Ford v. Harrington*, (16 N. Y. Rep. 285.) In that case the plaintiff's father, one Conway, was indebted to one Allen in the sum of \$60, which was due. Conway was in possession of 50 acres of land, under a contract, and was entitled to a conveyance on the payment of \$36, the land being worth about \$400. The defendant was an attorney at law, and was applied to by Conway to know if his creditor could reach this land. The defendant advised him that he could, and that he had better assign to him the contract, to prevent its being subjected to the claim of Allen, and that when he should have settled the debt with Allen he would let Conway have it back again. Conway took his advice and assigned the contract, and the defendant took the title and refused to convey it, as the defendant in this action does, and upon the same ground. The referee found that the contract was assigned for the purpose of defrauding Conway's creditor, Allen, but as the defendant was an attorney and counsellor the law would set aside the agreement made with his client by which the property was put into his hands to keep it out of the reach of his client's creditor, and the defendant should convey the land to the plaintiff. This judgment was affirmed at a general term of the 8th district and in the court of appeals. The case was put upon the ground that the defendant took advantage of the trust and confidence reposed in him to procure the assignment, and that the parties were not in *pari delicto*, and it was incompatible with the rules of equity to allow a man to retain an advantage thus unfairly and unconscientiously obtained. The defendant, it is true, in that case was an attorney and counsellor at law, but the case does not depend upon that fact, except as

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it placed the defendant in the relation of trust and confidence to the plaintiff. It was because the defendant occupied such a position and relation to the plaintiff that he was enabled to induce him to convey to him the property. It was by reason of the imposition and wrong doing in consequence of the relation of trust and confidence, that the court gave relief and redress. The same principle was applied in the case of *Osborne v. Williams*, (18 Ves. 379,) where the relation was that of father and son. The same principle applies to all cases where trust and confidence is reposed; to transactions between trustees and *cestuis que trust*, between guardian and ward, and to other persons in fiduciary relations. In this class of cases if there be any intermixture of deceit, imposition, overreaching or unconscionable advantage or other mark of deceit or positive fraud, courts of equity will give relief to the weaker party. (*Story's Eq.* §§ 307, 308, 309.) "The general principle," says Story, § 308, "which governs in all cases of this sort, is that if a confidence is reposed and that confidence is abused, courts of equity will grant relief." The defendant, I think, in principle, is clearly within the rule applicable to attorneys. If he was not in fact a licensed attorney, he acted in that capacity to the plaintiffs; he was their legal and confidential adviser, and it would be most unjust to let him retain the fruits of his fraud upon the ground that they were likewise guilty. They were by no means equally guilty. Upon this ground I think the judgment below can be sustained, and I think it should therefore be affirmed, with costs.

[MONROE GENERAL TERM, December 7, 1863. *B. Darwin Smith, Johnson and Welles*, Justices.]

FISHER vs. CLARK.

The right of every one to use his own property as he pleases, for all the purposes to which such property is usually applied, is unlimited and unqualified, up to the point where the particular use becomes a nuisance.

Simply turning one's own sheep, having an infectious disease, into his own lot, adjoining the lot of another occupied by sheep, is not unlawful, nor such an act of wrong or negligence as will give to the owner of the adjoining lot a legal cause of action, for damage sustained in consequence of the disease being communicated to his sheep.

THIS action was brought by the plaintiff, in a justice's court, to recover damages upon the following facts: The parties were farmers occupying adjoining farms. Each had a flock of sheep; those of the defendant had a contagious disease known as the *scab*, and the fact of the disease and its character were well known to the defendant. The defendant sent word to the plaintiff that he intended to turn this flock of diseased sheep in his own field next to the field of the plaintiff, where the sheep of the plaintiff were pasturing. The plaintiff thereupon called on him and told him he must not do it, insisting that he had no right so to do; and the result of the interview was, that the defendant promised the plaintiff that he would not turn said diseased sheep into the lot next to the plaintiff. Disregarding this agreement, and without notice or the knowledge of the plaintiff, the defendant did turn his sheep into a lot adjoining where the plaintiff's sheep were, and only separated by a common rail fence. The division fence belonged to the plaintiff to repair, and was a good fence. The sheep of the defendant got into the plaintiff's field and mingled with his sheep; no evidence to show how or by whose fault. They were in several times; once the plaintiff found a rail shoved aside where they might have passed, but he had no knowledge that they did. At the other times, it does not appear that there was any defect in the fence, or how they got in. The defendant also had with his flock of diseased sheep some lambs so small that an ordinary or common rail fence would not stop them, and they

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were frequently in the plaintiff's field with his sheep. That the disease was a contagious one, which would be communicated either by the mingling of the sheep or by running side by side separated only by an ordinary rail fence, appeared fully by the evidence. The plaintiff's sheep became diseased and largely damaged in their market value. The complaint of the plaintiff contained two counts; one charging that the defendant knowing his sheep were diseased with a contagious disease, turned them on his own land next to the plaintiff, by reason of which wrongful and careless act the plaintiff's sheep became diseased. The other charging that the defendant's sheep wrongfully broke or got into the plaintiff's field, and gave his sheep the disease. The defendant for answer denied the complaint, and set up that the line fence belonged to the plaintiff to repair, and that *the defendant's sheep got through into the plaintiff's field by reason of the fault or negligence of the plaintiff in not repairing his fence.*

There was a judgment for the plaintiff, upon the trial before the justice, for \$100 besides costs, from which an appeal was taken by the defendant, and the only ground substantially alleged was that the judgment was contrary to law. The county court affirmed the judgment; and the defendant appealed to this court.

D. Morris, for the appellant.

E. B. Pottle, for the respondent.

By the Court, E. DARWIN SMITH, J. It is well settled that every man has the absolute right to use his own property as he pleases, for all the purposes to which such property is usually applied, without being answerable for the consequences, provided he exercises proper care and skill to prevent any unnecessary injury to others. (4 Coms. 202.) This right to use his property as he pleases is unlimited and unqualified, up to the point where the particular use becomes a nui-

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sance. (22 Barb. 297. *Picard v. Collins*, 23 *id.* 444.) The complaint in this action, before the justice, stated that the defendant, while the plaintiff was occupying adjoining land to his for the pasturage of a flock of sheep, turned into his lot adjoining a flock of sheep which he knew had a contagious disease, known as the scab, by reason of which the plaintiff's sheep took the disease and he sustained damage. The gravamen of the complaint is that the defendant, knowing that the plaintiff had a flock of sheep running in his lot, turned his own sheep having the scab, a contagious disease, into an adjoining field on his own farm. There is no allegation of negligence, carelessness, or of a malicious intent to injure the plaintiff. The justice must have held upon the complaint, that this act of the defendant gave to the plaintiff a right of action to recover to the extent of the injury sustained: that is to say, he must have held, and that is the claim, that simply turning his own sheep having an infectious disease into his own lot adjoining a lot of the plaintiff's, occupied with sheep, was unlawful, or such an act of wrong or negligence as gave the plaintiff a legal cause of action for any injury sustained. To maintain an action there must be a legal injury, an invasion of some positive, certain legal right. It could be no violation of the plaintiff's rights for the defendant to occupy his own land in his own way, unless he created a nuisance thereon. Pasturing sheep having an infectious disease was not a nuisance. It was and could be no injury to the plaintiff unless he suffered his sheep to take the contagion by permitting them to come in contact with the defendant's sheep. Each party had a right to use his own field to pasture his sheep. If the defendant's sheep had infectious disease, infectious only to sheep, he had the same right to have the same in his own field as the plaintiff had to permit his sheep to run in the adjoining field, exposed to take such disease. A person sick with a contagious disease is not obliged to abandon his own house to prevent the spread of such disease. A house occupied by persons having an infectious

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disease is not a nuisance. (2 Barb. 104.) It is not pretended that the disease of the defendant's sheep was a nuisance. They did not render the enjoyment of life or property uncomfortable, (*Fish v. Dodge*, 4 Denio, 311,) or endanger the health of the neighborhood, (9 Paige, 575. 3 Barb. 157.) Nor were they offensive to the senses, like a slaughter house, or gas-works, or swine-styes, or lime-kiln, or a livery stable, or a tannery. (17 Barb. 654. 22 id. 312.) There is no basis to sustain the action on the ground of negligence; for the defendant invaded no legal right of the plaintiff. The principle of the maxim *sic utere tuo*, &c. will not sustain the action, according to the decision of the court of appeals in the case of *The Auburn and Cato Plank Road v. Douglass*, (5 Seld. 449,) where it is held that this principle only applies where one owns a tenement which is subject to the servitude of another tenement, or has an easement in another's land, or some fixed legal right or interest therein. The same case also decides that an action will not lie in such case on the ground that the defendant acted maliciously. The evidence in the case would perhaps have furnished some ground to raise such a question of fact, although the right of action in the complaint was not based upon any such ground. But the case last cited holds, that when the defendant has no legal right or interest in the plaintiff's premises, or easement or claim thereto, it is immaterial what may be the motives of the proprietor for dealing with his property in any particular way. The same principle was asserted in *Mahan v. Brown*, (13 Wend. 261,) and in *The Newburgh Turnpike Co. v. Miller*, (5 John. Ch. R. 101.) I do not see, therefore, upon what principle the judgment below can be sustained. The amount of the judgment shows that it was rendered upon the claim aforesaid, and not upon the ground of any technical trespass committed by the defendant's sheep in getting through or over the fence between the parties. If any damage was sustained from such trespass, it

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would not warrant the judgment rendered by the justice. The judgments of the justice and of the county court should therefore be reversed.

Judgments reversed.

[MONROE GENERAL TERM, December 7, 1863. *E. Darwin Smith, Johnson and Welles, Justices.*]

PLUMTREE vs. DRATT and PACKARD, commissioners of loans of the county of Wayne, and DENISON.

When an action is duly commenced against commissioners for loaning certain moneys of the United States, under the act of April 4, 1837, it is in effect brought against the state, and not against the commissioners personally.

It is therefore absolutely necessary to bring the state before the court, as a party, in the form prescribed by the statute, to enable the court to give any relief to the plaintiff.

If the complaint describes the defendants as "Commissioners of loans of the county of W." the addition to their names will be considered as merely *descriptio personarum*, and the action will not be deemed as brought against them in their official character as commissioners under the act mentioned. And if the objection is distinctly taken by demurrer, the plaintiff cannot be allowed to proceed in his action, but must amend.

A PPEAL from an order made at a special term, allowing demurrers to the complaint. The action was commenced against the defendants Dratt and Packard, as "Commissioners of loans of the county of Wayne," and Porter G. Denison. The action as disclosed in the complaint, was brought to vacate a mortgage sale, made by Solomon Upson and Clark Mason, the predecessors in office of the defendants Dratt and Packard, at which sale the defendant Denison was the purchaser, and to have the deed given by them to him, and a mortgage given by him to them, to secure the payment of the original loan, canceled, as clouds on the plaintiff's title. On the 27th September, 1862, the defendants Dratt and Packard, by the same official description, put in a general demurrer, alleging

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that it appeared upon the face of the complaint that it did not state facts sufficient to constitute a cause of action. The defendant Dennison, by the same title of action and description of parties, demurred: 1st. That it appeared upon the face of the complaint that there was a defect of parties defendant. 2d. That the complaint did not state facts sufficient to constitute a cause of action. The demurrers were argued together, before the Hon. E. DARWIN SMITH, justice, at the Rochester special term, February, 1863, when an order was made and entered, sustaining the demurrers, with costs, with leave to the plaintiff to amend his summons and complaint, on payment of such costs, by changing the official title of the defendants Dratt and Packard from that of "commissioners of loans of the county of Wayne" to that of "the commissioners for loaning certain moneys of the United States of the county of Wayne." The court, in a verbal announcement of its determination, stated, in substance, that there was no defect of parties defendant, and that the complaint contained sufficient facts to constitute a good cause of action to have the sale vacated and the deed and mortgage set aside and canceled, as clouds on the plaintiff's title, but that he sustained the demurrers on the sole ground that the defendants Dratt and Packard should have been described as "the commissioners for loaning certain moneys of the United States of the county of Wayne," as required by the 5th section of the act of April 4, 1837. The plaintiff appealed from so much of this order as sustained the demurrers, with costs, and as imposed upon the plaintiff the payment of such costs as a condition of amending his complaint.

C. D. Lawton, for the appellant.

Wm. S. Stow, for the respondents.

By the Court, E. DARWIN SMITH, J. The demurrer in this action was sustained upon the single ground that there was a defect of parties defendants to enable the court to

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grant the relief demanded in the complaint. No cause of action is stated in the complaint against the defendants Dratt and Packard. The addition to their names of the words *commissioners of loans of Wayne* is merely a *descriptio personarum*. As against these defendants, regarded as mere private persons, the demurrer is sustainable on the ground that the complaint does not state sufficient facts to constitute a cause of action. They are clearly not made parties in their private capacity, but with the view to relief against them in their official capacity as commissioners of loans. They had no connection with the original fraud of which the plaintiff complained, and have done no acts injurious to his rights. They are simply successors in office of a former board, by which the fraudulent and injurious acts complained of were committed. The state has invested two persons in each county with authority to loan certain moneys, received from the United States, to the people of each county, by act passed April 4, 1837, and which is referred to in the plaintiff's complaint. The act declares that such commissioners of the several counties shall respectively be known and distinguished by the name and style of "The commissioners for loaning certain moneys of the United States of the county," of which they were respectively commissioners, and declares that they shall be named and described by such name and style in all legal and other proceedings which may be had under the provisions of such act. All acts and deeds of said commissioners were to be done in the name and style thus declared, as much so as though they were a corporation by such name. The plaintiff seeks to set aside the foreclosure of a mortgage given to such commissioners in the name and style aforesaid, and also a mortgage executed to and taken by them from the defendant Denison by and in the name and style aforesaid. Such at least we must presume to be the case, for the 50th section of the act aforesaid prescribed the form of mortgages to be received by such commissioners, and such form is to them by such name and style without naming

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personally the commissioners. And so are deeds to be executed by them as prescribed by the 57th section of said act, and such must therefore have been the form of the deed to Denison. When an action is duly commenced against the commissioners as named in this act, the action is in effect against the state, not against the commissioners personally. The legislature has prescribed that the state will sue and be sued in respect to the moneys loaned by these loan commissioners in the manner and form particularly prescribed in the act. The form must be pursued, to bind the state. It is therefore, I consider, absolutely necessary to bring the state, in the form prescribed, before the court as a party, to enable the court to give any relief to the plaintiff. The foreclosure and sale of the original mortgage, the deed executed to Denison, and his mortgage back, must be set aside. The state is the party chiefly to be affected, and must be sued, to be bound by any decree or judgment. But as these commissioners are in the nature of agents for the state, acting by a corporate name and using such name for the benefit of the state, if they had appeared in the action and litigated the question arising upon the plaintiff's complaint, the court would undoubtedly, at any stage of the proceedings, substitute their proper corporate names for their personal names; but until this is done there is a defect of parties, and no valid judgment can be given to bind the state. The point being distinctly made by the defendants, by demurrer, I see no way but to sustain the demurrer and allow the amendment. This is what I designed to do in allowing the demurrer before, and this I think must be done. The plaintiff, when the objection is distinctly made, cannot be allowed to proceed when he can have no valid decree against the parties to the record. He must amend, to obviate that objection. But it is said the objection in question does not appear upon the record. This I think is a mistake. The act under which the defendants were appointed, and under which their predecessors acted, and under which all the proceedings upon the foreclosure in

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question were had, must be deemed a part of the complaint, and must be referred to to explain and maintain it. We must look to this statute to ascertain the rights of the parties. It is also said this point cannot be raised by demurrer. This I think a mistake. The demurrer raised the point that "there is no cause of action stated against the defendants Dratt and Packard personally," and if they are sued in their official capacity their corporate name is not used. This point is properly raised by demurrer. I think the order made below must be affirmed with costs.

Order affirmed.

[MONROE GENERAL TERM, December 7, 1863. *E. Darwin Smith, Johnson and Wells, Justices.*]

 MCQUEEN vs. BABCOCK and others, executors, &c.

It being the duty of an assignee under an assignment to him in trust for the benefit of creditors, to take care of and protect the assigned property, he may maintain an action of trespass against any person who interferes therewith.

The bringing of such an action by the assignee, against one who assumes to take the assigned property out of his possession, is in furtherance of his duty, and hence is not an intermeddling with the property improperly, or within the sense and meaning of an injunction order prohibiting him from "intermeddling with, receiving or collecting" any of the property of the assignor.

Such an injunction is no bar to a suit against the sheriff, for taking the assigned property out of the hands of the assignee; and if suit is not brought within three years, the statute of limitations will be a good defense.

MOTION for judgment on a verdict taken, subject to the opinion of the court at general term. On the 31st day of October, 1857, Henry A. Brown assigned certain property to the plaintiff, in trust for the benefit of creditors. On the 19th of January, 1858, certain judgment creditors of Brown commenced an action in equity against Brown and the plaintiff, for the purpose of setting aside the assignment and having—

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ing the property applied upon their judgments; and on the same day an injunction order in that action was served upon the plaintiff, enjoining him "to desist and refrain from intermeddling with, receiving or collecting, any of the property of Brown, real or personal, including the property mentioned and described in the said assignment." On the 24th of February, 1858, the defendants' testator, Alexander Babcock, levied on the property of Brown, and afterwards sold it upon an execution issued to him as sheriff of Monroe county. The injunction was dissolved on the 12th of January, 1859. This action was commenced May 18, 1861, and was brought for the alleged conversion by the defendants' testator of the property so levied on by him, and claimed by the plaintiff as assignee of Brown. The only question made by the defendants arose upon the 4th defense, which was that more than three years had elapsed since the cause of action arose, and that the action arose against the defendants' executor, if at all, for acts done by him as sheriff of Monroe county. This action was tried at the Monroe circuit, in January, 1863, when a verdict was ordered for the plaintiff, subject to the opinion of this court, on a case to be made by the plaintiff.

G. F. Danforth, for the appellant.

J. D. Husbands, for the respondents.

By the Court, E. DARWIN SMITH, J. The simple question presented in this case is whether the plaintiff's action is barred by the statute of limitations. The defendants' testator was sheriff of Monroe county, and this action being for a liability incurred by acts done by him in his official capacity and in virtue of his office, the limitation of three years applies to it under section 92 of the code. The defense under this statute is complete, unless the time during which the injunction, issued in the action of *Adams v. Brown* and the plaintiff was in force is to be deducted from the time which elapsed after

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the cause of action accrued, before it was commenced. Section 105 of the code is as follows: When the commencement of an action shall be stayed by injunction or statutory prohibition the time of the continuance of the injunction or prohibition shall not be part of the time limited for the commencement of the action. The injunction order restrained the defendant, the present plaintiff, McQueen, and others "from selling, assigning, conveying, or in any way or manner disposing of or incumbering or intermeddling with, delivering, negotiating, discharging, receiving or collecting any of the property of the defendant Henry A. Brown, real or personal," including the property mentioned in a certain assignment from Brown to McQueen, therein mentioned. The sheriff seized some part of this property while it was in the possession of the plaintiff in this action, under said assignment, as the property of Brown, on the attachment against him, and sold it afterwards upon an execution issued in such attachment suit. The action is brought to recover the value of such property after the dissolution of such injunction and the termination of the suit in which it was issued. Did the injunction order restrain the commencement of an action for the recovery of such property or damages for the taking thereof? I think it did not. It clearly does not in *express terms*. No words in the injunction order restrain the commencement of a suit to recover for taking the property in question from the plaintiff's possession. He is forbidden to sell, assign, or in any way or manner to dispose of or incumber the property. These words do not forbid the commencement of a suit. If there is any such prohibition it must be embraced in the words *intermeddling with* such property. The words receiving or collecting any of such property apply to notes and accounts, or property not in possession of the plaintiff at the time of the service of the injunction. What is the meaning of the phrase *intermeddling with* such property? Webster defines the word *intermeddling* as follows: "To meddle with the affairs of others in which one has no concern; to meddle officiously;

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to interpose or interfere improperly; to intermix." Intermeddling with the property referred to in the injunction order meant to meddle with it *improperly*, to do something to or with it that might affect injuriously the plaintiff's rights in that action. It was used as a more comprehensive word than any other employed to forbid such interference with the property. It did not mean that the defendant should not take care of or protect such property. One of the articles of property was a carriage. If this carriage had happened to be in the street or field, exposed to rain or other injury, certainly it would not have been intermeddling with the same, in the sense of the injunction order, to have put it under cover or in a place of safety. Suppose the lumber also seized by the defendant had been exposed to injury from any cause, it would not have been a violation of this clause of the injunction to have taken care of it. The plaintiff was a trustee of this property. It was in his possession as such trustee. The title to it was in him, as against all persons except some judgment creditors who might impeach it for fraud. It was a trespass, *prima facie*, for the defendants' testator to seize such property. Such seizure could only be justified by proof of fraud in the assignment from Brown to the plaintiff, and a lien upon such property under judgment and execution against Brown. Having accepted the assignment from Brown and entered upon the duties of assignee, and received the property in question in that capacity, it was his clear duty to protect and defend such possession and preserve the property. If he had permitted any person to remove the property from his possession he would have been liable therefor. Until a receiver had been appointed in the creditors' suit, no one but the plaintiff could protect the property from waste, conversion or destruction. As it was thus his duty as a trustee to take care of and protect and preserve such property, he could maintain an action of trespass against any person who interfered therewith. The commencement of such action would be in furtherance of his duty, and could not be in con-

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tempt of the injunction order. If he had lain still and suffered such property to be taken away and it had carelessly been lost, he would have been clearly liable therefor. This seems to me to settle the question that to commence an action against a person who assumed to take such property out of his possession would not be intermeddling with such property improperly or within the sense and meaning of this injunction order. It follows that if he could commence such suit and it was his duty to do so to protect the property, the injunction order could not be construed to forbid the commencement of such action. I think it clearly did not. The right of action arose upon the taking of the property by the defendants' testator from the plaintiff's possession. Such right of action was not suspended by the injunction order, and consequently the statute of limitations is a good defense in this action. Judgment should therefore be given for the defendant upon the verdict.

[MONROE GENERAL TERM, December 7, 1863. *E. Darwin Smith, Wallen and Johnson, Justices.*]

THE COMMERCIAL BANK OF ROCHESTER *vs.* THE CITY OF
ROCHESTER.

In an action to recover back money paid on compulsion, or by duress of goods, the complaint should state the facts, and not a mere conclusion of law. The court must be able to see, from the facts stated, that the payment was in fact compulsory and compelled by duress of the party's goods. It is not sufficient simply to allege, in a general way, that the payment was compulsory, and not voluntary.

A PPEAL from an order made at a special term, overruling a demurrer to the complaint.

T. R. Strong, for the appellant.

G. W. Miller, for the respondent.

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By the Court, E. DARWIN SMITH, J. The question presented upon this appeal is purely one of pleading. The law is well settled that money paid voluntarily upon a doubtful claim, in settlement or compromise of it cannot be recovered. It is equally well settled that money extorted by a duress of the person or of personal property is recoverable if it was not justly due. In *Harmony v. Bingham*, (2 Kern. 116,) Justice Ruggles states the rule as follows: "When a party is compelled by duress of his person or goods to pay money for which he is not liable, it is not voluntary but compulsory." In such case, he says, the party constrained by such duress "may pay the money, relying upon his legal remedy to get it back again." The question is whether the plaintiffs state a case in their complaint which brings them within this rule in respect to compulsory payments. The allegation or complaint is that the plaintiff was compelled to and did pay under protest and by compulsion and not voluntarily, to the said defendant, the said sum of \$6194.07. It seems to me that this is not a sufficient statement to make out a case of duress of goods, or such a compulsory payment as the rule above stated requires, to allow a recovery of the money paid. It states a mere conclusion of law, not the facts. The court must see from the facts stated, in such a case, that the payment was in fact compulsory and compelled by duress of the goods of the party making the payment. Whether the payment is compulsory in such a sense as brings the party within the rule of law applicable to such cases, is a question of law for the court, upon stated or conceded facts. The court may differ with the plaintiff in respect to what constitutes a compulsory payment. In the case of *Harmony v. Bingham*, (*supra*,) the defendant had possession of the plaintiff's goods and refused to deliver them until the disputed and illegal charge was paid. The payment was then made to get possession of the goods. This the court held was a proper case of duress of goods, and a recovery back of the money paid was sustained. In the case of *Astly v. Reynolds*, (2 *Strange*,

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915,) which is a leading case on the subject, the defendant had possession of the plaintiff's goods upon a pledge or as security for £20 and a demand of £10 for interest. The plaintiff paid £10 to get possession of his goods, and it was held he was entitled to recover the money so paid. In all the cases where discovery has been had the facts showing the duress of the goods is stated. It cannot be sufficient, I think, simply to allege, as is done here, in a general way, that the payment was compulsory and not voluntary. Aside from this question I do not see why the plaintiff is not entitled to recover the amount of the tax for which the action is brought. The plaintiff may amend the complaint and make out a proper case, and judgment should be given for the reversal of the order of the special term, overruling the demurrer, and the same should be sustained, with leave to the plaintiff to amend on payment of the costs of the demurrer.

[MONROE GENERAL TERM, December 7, 1863. *E. Darwin Smith, Johnson and Wells, Justices.*]

THE STATE BANK OF TROY vs. THE BANK OF THE CAPITOL.

For the purposes of protest, a collecting agent occupies the position and is held to the obligations of a holder of commercial paper.

In the case of a bill or note, sent to a bank as agent for *collection* merely, in the absence of proof of an express contract or of commercial usage, it is not obligatory on the collecting bank to notify and duly charge *all* the prior parties to the paper, but only its own principal, or immediate indorser. If the collecting bank undertakes to transmit notices of protest to other parties besides its immediate indorser, although this may be *some* evidence of an agreement to notify all the indorsers, it is not *sufficient* evidence of such an agreement, in the absence of proof of custom or usage.

MOTION for a new trial, on exceptions taken at the circuit and ordered to be heard in the first instance at the general term.

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J. Romeyn, for the plaintiff.

Ira Shafer, for the defendant.

By the Court, HOGEBOM, J. This action is brought by the plaintiff against the defendant to recover damages for the defendant's negligence in the protesting of a draft, sent to it for collection by the plaintiff. The defendant was the plaintiff's collecting agent at Albany, where the draft was payable. It was drawn by Oramel Brewster on Arland Carroll, and payable to the order of W. C. Watson, and indorsed by him and by John Roth & Co. to David Dater, who was the owner thereof, and who indorsed and delivered it to the plaintiff for collection; and the plaintiff, through its cashier, thereupon indorsed and delivered it to the defendant, a corporation located at Albany, for collection. Payment of the draft was duly demanded but not made, and thereupon the defendant in due season sent notices of protest to the plaintiff, for itself and all the previous parties to the draft, directed to them in their proper names, except W. C. Watson, whose name was Winslow C. Watson, but who was described in the notice of protest as Wm. C. Watson. The notices to the indorsers, received by the plaintiff from the defendant, were seasonably forwarded by the plaintiff and reached them. That directed to Wm. C. Watson came to the hands of the indorser, W. C. Watson, at Port Kent, where he resided, and to which place the notice had been forwarded by the plaintiff. Dater, being the owner of the draft, prosecuted some or all of the previous parties to the paper, including the acceptor; but they were insolvent, except Watson, and Dater was defeated as to him by reason of the misdirection in the notice of protest. Dater thereupon prosecuted the plaintiff, in whose hands he had placed the draft for collection, for negligence and improper protest of the draft as to Watson, and recovered. That recovery embraced not only the amount of the draft and interest, but the costs both of prosecution and defense in the suit

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of *Dater v. Watson*, which Dater had paid, and which suit Dater had given the plaintiff notice to defend. The plaintiff thereupon brought this action against the defendant, for like negligence and improper protest of the note, and having given the defendant notice of the previous suits of *Dater v. Watson*, and *Dater v. The State Bank of Troy*, during the pendency thereof, was permitted to recover, 1. The amount of the draft and interest; 2. The costs of the suit; 3. The costs both of the prosecution and defense of the suit of *Dater v. Watson*; 4. The costs both of the prosecution and defense of the suit of *Dater v. The State Bank of Troy*.

The rulings at the circuit were, it is evident, designed to be liberal in favor of the plaintiff, to the end that if the plaintiff was entitled to recover for all or only a portion of these items, the amounts of which were readily ascertainable from the evidence, a new trial might be avoided, if possible, and the verdict properly corrected if necessary, as to amount; or if not, or the defendants were entitled to a verdict, that a single new trial would be sufficient to adjust the rights of the parties according to law. The exceptions to evidence and to the charge of the court are presented in so many various forms as to make this practicable.

To dispose of this case correctly it is of importance to see in the first place what was the precise duty and obligation of the defendant. It was the plaintiff's collecting agent at Albany and received the draft in question for the purpose of collection. Ordinarily, it is claimed on the part of the defendant, this duty is satisfied by a demand of payment, and in the event of non-payment seasonable notification of that fact to its principal. (*Edwards on Bills*, 476. *Mead v. Engs*, 5 Cowen, 303. *Bank of U. S. v. Davis*, 2 Hill, 451. *Spencer v. Ballou*, 18 N. Y. Rep. 327. *Farmers' Bank of Bridgeport v. Vail*, 21 id. 485.) It had no interest in the draft itself, and had contracted no obligation to any of the other parties to the draft. It was its duty to notify the plaintiff, without delay, of the non-payment of the draft,

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in order that the plaintiff might seasonably notify the previous parties to the paper. The time allowed to the defendant for this purpose was the same that would have been allowed to the defendant had it been the actual owner and holder of the paper.

For the purposes of protest, a collecting agent occupies the position and is held to the obligations of a holder of commercial paper. (*Mead v. Engs*, 5 Cowen, 303. *Howard v. Ives*, 1 Hill, 263. *Bank of U. S. v. Davis*, 2 id. 451. *Farmers' Bank of Bridgeport v. Vail*, 21 N. Y. Rep. 487, 488. *Ogden v. Dobbin*, 2 Hall, 112.)

As the ultimate indorsee, (if it had owned the paper itself,) it would have been entirely at its option whether to give notice of protest only to its immediate indorser or to all the previous parties to the draft, or not to give any notice at all. In such event as last suggested the drawer and all the indorsers would be discharged, and the acceptor alone held on due demand of payment from him. If satisfied with the responsibility of the last indorser, a demand of payment and notice to such last indorser would have been sufficient. As collecting agent for the plaintiff its duties were somewhat different and dependent upon the express or implied contract which it had made with the plaintiff. It had made no contract with any other person.

If the contract with the plaintiff was to demand payment of the note, and notify all the parties of the non-payment, such contract must of course be fulfilled. Such a contract is sometimes made in express terms, and sometimes it is implied from custom and usage and the course of business. (*Smedes v. Bank of Utica*, 20 John. 372. 3 Cowen, 662. *Edwards on Bills*, 475, 476.) In such case it is of course obligatory. Whether in the case of a bill or note, sent for collection merely, and in the absence of an express contract as to the precise duty to be performed, the presumption of law is, that the corresponding or collecting agent will take the necessary steps to charge all the parties to the paper, is a question of

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much embarrassment, and not I think as yet clearly settled in this state. I am inclined to think that in such case (there being no proof of express contract or usage) it is not obligatory on the corresponding bank to notify and duly charge all the prior parties to the paper.

I state this proposition as on the whole the result of the adjudications in this state, although it must be confessed that for a case so likely to occur, and to require the existence of a clear and well established rule, the cases are far from uniform. In *Mead v. Engs*, (5 Cowen, 303,) the suit was against an indorser, to whom notice of protest was sent from the next preceding indorser, after an interval of some days had occurred in transmitting subsequent indorsements, though in each case it had been sent to the next preceding indorser the day after it had been sent to his indorser. The court laid down this rule: "One to whom a bill or note is indorsed as agent to collect (e. g. a bank) is a holder for the purpose of giving and receiving notice of non-payment, and he is not bound to give notice of non-payment directly to all prior parties, but may notice his next immediate indorser, who is bound to notice his indorser, &c. in the same manner as if the bill or note had been negotiated for a valuable consideration." The defendant had offered evidence that it was the custom of New York banks which received bills or notes for collection to give notice of non-payment directly to all prior parties. This evidence was excluded, and as the supreme court held, properly, as not being material. They say: "The evidence of custom which was rejected by the judge was in no respect material." It is prudent and probably customary for the holders of bills of exchange to give notice of their dishonor to all the parties to the bill. They may not wish to run the hazard of some of the parties being discharged by the omission of such notice. But if the holder is satisfied with the responsibility of his immediate indorser, there is no necessity for his giving notice to any previous party; and if such notice is given by the

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other parties to the bill, the holder may recover against any of them." (*Id.* p. 309.)

In *Howard v. Ives*, (1 *Hill*, 263,) and *Bank of U. S. v. Davis*, (2 *id.* 451,) the same general principle is recognized, that an agent holding paper for collection is a principal for the purpose of transmitting notice of protest. The head note of the latter case contains this proposition: "When a bill or note is indorsed by the holder and sent to an agent for collection, the latter need not give notice of dishonor to all the parties, but it is enough if he notify his principal, who may charge the prior parties, by giving them notice himself; and this though it appear that had the notices been sent by the agent they would have been received sooner."

Other cases in our own courts affirm the same general doctrine, and they appear on their face to state in unqualified terms that the duty of the collecting agent is discharged if he seasonably notify his own principal. But it is proper to observe that they seem to be cases where the question arose between the holder and an early indorser, and the right of recovery turned upon the point whether such indorser could be charged by consecutive notices on successive days from each indorser to his next preceding indorser; and the question did not arise between the holder of the paper and the collecting agent to whom it had been sent for collection, where the right of recovery turned upon the nature of the contract which such agent made with his principal, whether such contract was to notify only his principal or all the previous parties to the paper. This latter question, however, arose directly in the case of *Smedes v. The Bank of Utica*, (20 *John.* 372; *S. C. in error*, 3 *Cowen*, 662.) It was an action of assumpsit against the bank, to recover damages for default in notifying all the indorsers. The general proposition is thus stated in the head note of the case: "Where a promissory note is indorsed and delivered to a bank for collection there is an implied undertaking on the part of the bank, in case the note is not paid, to give notice of the default of the maker to *all the indorsers*." It is to be noticed, however,

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that the plaintiff, in order to support his cause of action, proved that it was the uniform custom and established understanding of banks to give notice to all the indorsers. There was no contradiction of this testimony, and on the strength of it the plaintiff recovered. The court said (p. 378) that they thought they might take judicial notice of this general custom and understanding, but that at all events it was fully proved in the case. The case was affirmed in the court of errors, although there the question turned mainly on the point whether a sufficient consideration for the undertaking of the bank was alleged and proved.

In *Curtis v. Leavitt*, (15 *N. Y. Rep.* 167,) this matter is incidentally alluded to in the opinion of Justice Shankland, as follows: "There is another class of obligations into which these banks can enter, and which though not expressed are yet inferred as incidental to the power of receiving deposits. It is that of assuming to charge indorsers of the notes of its customers left with the bank for collection. This obligation springs out of the custom of bankers receiving such notes to collect, on the express or implied agreement that the money when collected will remain on deposit for some short time, at least, for the benefit of the bank. If the bank neglects to use due diligence to charge indorsers on commercial paper thus left with it, it is subjected to the loss. This responsibility of banks has been enforced in this state in numerous instances. (20 *John.* 372. 3 *Cowen*, 662. 11 *Wend.* 473. 22 *id.* 215. 6 *Hill*, 648.)

In *The Bank of Utica v. McKinster*, (11 *Wend.* 475,) the question was not discussed, but the liability in a proper case was assumed to exist. The chancellor says: "By the decision of this court in *The Bank of Utica v. Smedes*, (3 *Cowen*, 662,) it was settled that the bank was liable to an action for a neglect to give notice to the indorsers according to the usual course and practice of banks."

In *Montgomery Co. Bank v. Albany City Bank*, (3 *Seld.* 460, 461,) Judge Jewett declares it to be a rule of law well

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settled in this state, that a bank receiving a bill from the owner, for collection, is bound to present it for acceptance and payment, and if not paid when presented for payment it must take such steps by protest and notice as are necessary to charge the *drawer* and *indorser*, or it will be liable to its principal, the owner, for the damages which the latter sustains by any neglect to perform such duties, unless there be some agreement to the contrary, express or implied.

In the case of *Allen v. The Merchants' Bank of New York*, (22 *Wend.* 228,) Senator Verplanck, delivering the opinion of a majority of the court, uses this strong language: "It is well settled in this state that there is an implied undertaking by a bank or banker receiving negotiable paper deposited for collection, to take the necessary measures to charge the drawer, maker, or other proper parties, upon the default or refusal to pay or accept. (*Smedes v. Bank of Utica*, 20 *John.* 372; and same case in this court, 3 *Cowen*, 663. *McKinster v. Bank of Utica*, 9 *Wend.* 46; 11 *id.* 473, *S. C.*)"

These authorities on each side of this question do not, in my opinion, leave the matter free from doubt. I am inclined to think that the tendency of the latter adjudications is, in the absence of proof of any express contract or of commercial usage, to treat a mere corresponding or collecting agent as discharging its duty by a proper demand of payment and notice of non-payment to its principal. I am the more inclined to adopt this conclusion from the insignificant benefit or compensation usually received by banks for the performance of a service so responsible and important. I am not without doubt as to what the true rule of law is, but on a new trial the case may perhaps to some extent be relieved of some embarrassment by affirmative proof of an express contract, or established custom. I think, therefore, the defendant's duty would have been discharged on seasonably notifying the plaintiff of the non-payment and protest of the note.

But it undertook to do something more, and the question is whether that is evidence of its having agreed to do some-

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thing more; or if not, whether the manner of doing it was such as naturally to mislead the plaintiff and to induce a course of conduct by the latter which has subjected it to pecuniary liability to others. The defendant did what it was not probably obliged to do; to wit, transmit notices of protest to other parties. This might be *some* evidence of an agreement to notify all the indorsers, but not sufficient evidence, I think, of such an agreement in the absence of proof of custom or usage.

But in sending these notices of protest, it misdescribed one of the indorsers by calling him Wm. C. Watson instead of W. C. Watson, or Winslow C. Watson, and the plaintiff doubtless relying upon the correctness of the address forwarded the identical notice sent to it. It may be claimed that the act of the defendant in misdescribing Watson, misled the plaintiff and produced all the injurious results which followed; that as the defendant had possession of the draft, and the opportunity of inspecting the signature of the indorser, and the plaintiff had not, (at the time the notice was sent,) the latter had a right to rely upon the correctness of the address thus sent; that it was in effect a representation that such was the name of Watson in fact, or as it appeared on the paper in question. It may be that there was a question for the jury on this point, but as it was not made on the trial, and does not appear to have governed the court in the disposition of the case, I think it ought not to control us upon this occasion.

It results from these observations that a new trial must be granted in this case. For, 1. If there was no express or implied contract further than is shown in this case, the only notice of protest which the defendant was obliged to give, as we on the whole are inclined to hold, was that to the plaintiff, and that was seasonably sent. On such proof the defendant and not the plaintiff would be entitled to a verdict. The notification to the defendant, of the object and pendency of the two previous suits brought by Dater, did not impose upon it the obligation to defend. Such a notice has no effect unless

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there be some relation or privity between the parties in regard to the subject of the litigation.

2. As the defendant had made no contract express or implied with Dater or any of the parties to the draft except the plaintiff, it cannot be responsible to Dater or the plaintiff for his failure to recover against Watson or the plaintiff. It had not agreed with Dater to notify Watson of the non-payment of the note, and hence could not be responsible to Dater for not doing so. Hence it would not be responsible for the costs of the litigation between Dater and Watson.

3. Nor had it made any contract with the *plaintiff* to notify Watson. It was the plaintiff's own business to do so, or to notify Dater and give him an opportunity to do so. If it had made such a contract it would have been liable for the costs of both suits, as it was notified of the pendency of both and had an opportunity to conduct the one and defend the other. But as it had not made such a contract it was not liable for the costs of either litigation.

4. The foregoing suggestions are made with reference only to the proceedings as they stand in the case now considered. If the plaintiff, on a new trial, shall be able to satisfy a court and jury either, (1.) That there was an express contract to notify all the indorsers; or (2.) That there was an implied contract resulting from commercial usage or the course of business; or (3.) That the natural and necessary result of the misdirection of Watson's name in the notice of protest was to subject the plaintiff to the damages sustained by it in the litigations to which it has been subjected, then the plaintiff will be entitled to recover against the defendant for such damages. The precise amount of them, as well in regard to the items of costs as otherwise, will depend upon the circumstances developed on the trial, and may to some extent be varied by the character or degree of the proof offered.

In what has been said it has been assumed that Watson was discharged from liability by the insufficiency of the notice. This is in accordance with what is alleged to have been the

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decision of this court, in regard to this very notice, in some one of these prosecutions. I do not find the case reported, nor have we been supplied with the opinion of the court. As an original question, with my present views I should have come to a different conclusion, but presuming that the court gave to the question mature deliberation and made the decision claimed, it is more appropriate, and indeed obligatory upon us, to conform to the views thus expressed.

There must be a new trial, with costs to abide the event.

[ALBANY GENERAL TERM, December 7, 1863. *Hogeboom, Peckham and Miller, Justices.*]

RITT and others vs. THE WASHINGTON MARINE AND FIRE INSURANCE COMPANY.

Where an agent of an insurance company, authorized to effect insurances on vessels, &c., and to procure policies from the company and deliver them to the insured, receives and accepts an application, and negotiates an insurance, as agent, on property of which he is one of the owners, and communicates the transaction to his principal, without disclosing his interest in the property, and on receiving a policy from the company, delivers the same to the insured, such policy is void.

It is the duty of an agent of an insurance company to acquire the proper information, and make the necessary examination, to lead to an intelligent decision upon the acceptance or rejection of the risk offered. The company has a right to the exercise of the agent's disinterested skill, diligence and zeal, for its own exclusive benefit.

And while acting as agent, he cannot at the same time take upon himself incompatible duties and characters; or become agent in a transaction, where he has an adverse interest or employment.

An insurance, produced in that manner, is not avoided on account of the materiality of the relation of the agent to the risk, but because it is against public policy to allow such agreements to stand.

Even if it could be shown that the relation was not material to the risk, the insurance would be void.

A PPEAL from a judgment rendered on a verdict. The facts appear in the opinion of the court.

Ritt *v.* Washington Marine and Fire Insurance Co.

Geo. B. Hibbard, for the appellant.

John Ganson, for the respondents.

By the Court, DANIELS, J. In March, 1861, Gardner, Ritt & Fox, of the city of Buffalo, were authorized by the defendant, an insurance corporation in the city of New York, to effect risks binding upon it on vessels, steamboats, propellers and their cargoes, which were to be communicated to the company by the next mail, and the policy immediately forwarded, unless it elected to decline the risk; for which services they were to receive ten per cent upon the amount of the premiums. The plaintiff, Michael Leo Ritt, was one of the members of this firm, and continued to be so to and including the time of the issuing of the policy in suit. On the 15th of October, 1861, the plaintiffs became the owners of the steamboat Key Stone State, and on the 30th day of that month, and after she had undergone certain repairs at the port of Buffalo, an application was made for the defendant to insure her. It was directed to Gardner, Ritt & Fox, agents, and made in the name of Francis Handel, on behalf of himself and others, owners. In making it, a blank form was used, which was mostly filled up by the plaintiff, M. L. Ritt. But it nowhere appeared in it that he was in any manner interested in the steamboat. It stated that a note would be given for the premium "*by all the owners*, and that the application was considered binding until rejected and notice given the applicant, or approved and the contract of insurance perfected by the issue of the company's policy, by Gardner, Ritt & Fox, agents." Upon this application the policy on which the suit is brought was executed and sent by mail to these agents for delivery, and after its delivery by them they mailed the premium note to the defendant. That was made by the plaintiffs, Francis Handel and Gregory Ritt, payable to the order of and indorsed by the plaintiff, M. L. Ritt. In the latter part of November, 1861, the steamboat

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was lost in a storm upon Lake Huron, which was one of the perils covered by the policy. Evidence was given on the trial showing that another insurance was procured upon her on the 6th of November, 1861, by M. L. Ritt, at Cleveland. The application for that insurance was subscribed in his own name, and the note given was jointly made by all the plaintiffs. The defendant was first informed after the loss that M. L. Ritt, one of its agents, was interested in the subject of the insurance. Evidence was also given tending to show that the steamboat was unseaworthy at the time the policy in suit was issued, and at the time of her loss. But on that as well as the other questions of fact the jury found for the plaintiffs.

Upon the trial the court seems to have distinguished between the validity of the application and the policy, holding that the former was not legally binding on the defendant, while the latter was. In that view of the law the jury were instructed that the relation of M. L. Ritt to the defendant rendered the application voidable, but as the defendant had issued the policy upon it, the relation referred to did not affect that, unless the concealment of his interest by the agent was material to the risk, and if material to the risk, then the policy would be void. The defendant excepted to these propositions, insisting that the policy was voidable on account of the relation which M. L. Ritt sustained to it. The court erred in withholding from the jury the instruction requested, and also in that actually given to them.

From the form and tenor of the application, the applicants for insurance, and the agents of the defendant, would be supposed to be persons entirely different and distinct from each other. It proceeds from Handel and others, owners, and is directed to Gardner, Ritt & Fox, agents, and accepted by them in that capacity, by the subscription of their firm name. M. L. Ritt was acting here in three different capacities. For himself as one of the owners, for the other owners as their agent, and for the defendant as one of its agents. But his duty to

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the defendant was not terminated with the application, for by the terms of the appointment under which he acted as agent, as well as the express stipulation of the application, the agents were to procure the policy from the company and issue it to the insured. The final act required to give validity to the insurance was to be, and was in fact, their act as agents. The making of the policy by the company depended upon whether it accepted or rejected the application taken by the agents; and when accepted, as it was in this case, the company incorporated into the policy the terms of the application. It was not a different agreement, but the formal adoption of the one already temporarily made by the agents. The duties of the agents, to the company, were the same as they would be where they have authority to receive the application and at once issue the policy upon it. In either case the agent should acquire the proper information, and make the necessary examination, to lead to an intelligent decision upon the acceptance or rejection of the risk offered; and in each class of cases the company must place the same reliance upon its agent for the discharge of those duties. When a risk has been accepted the company has a right to suppose the duty to have been carefully and impartially performed, and in that belief to issue the policy. For such is the obligation the agent incurs to his principal. In the discharge of his duty the principal has a right to the "exercise of his disinterested skill, diligence and zeal, for his own exclusive benefit." (*Story on Agency*, § 210.) And while acting as agent he cannot take upon himself at the same time incompatible duties and characters, or become agent in a transaction, where he has an adverse interest or employment. (*Id.* § 9.) "The general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self interest and integrity. The disability to purchase is a consequence of that relation between them, which imposes on the one a duty to protect the interest of the other, from the faithful discharge of which

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duty, his own personal interest may withdraw him. In this conflict of interest the law wisely interposes. It acts not on the possibility that in some cases the sense of that duty may prevail over the motives of self interest, but it provides against the probability in many cases and the danger in all cases, that the dictates of self interest will exercise a predominant influence and supersede that of duty." (*Per Wayne, J. in Michaud v. Girod*, 16 *Curtis*, 191.) That he was jointly an agent with two others did not relieve him from this obligation, for it rested indivisibly upon each alike. (*Story on Agency*, § 42.)

An insurance produced in this manner is not avoided on account of the materiality of the relation of the agent to the risk, but because it is against public policy to allow such agreements to stand. Even if it could be shown that the relation was not material to the risk, the insurance would still be void.

The law will not allow the agent to place himself in such an attitude towards his principal as to have his interest conflict with his duty. The propriety of applying the rule in this case is illustrated by the controversy upon the trial as to the seaworthiness of the steamboat.

In the case of *The Utica Ins. Co. v. The Toledo Ins. Co.*, (17 *Barb.* 132,) both companies had the same agent, who reinsured in one company a risk taken by him in the other. The policy was declared voidable, and Allen, justice, in the course of his opinion, says, "It is quite clear, upon authority as well as upon principle, that Clark, as agent for the defendant, could not have made a valid contract of insurance with himself upon his own property." (*Id.* 134.) In *The N. Y. Central Ins. Co. v. The Protection Ins. Co.*, (20 *Barb.* 468,) the same principle was declared; and when the same case was before the court of appeals, Denio, Ch. J. remarked: "No one will contend that he, as the defendant's agent, could have made a contract to insure himself."

The defendant also requested the court to instruct the jury

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that if the existence of the interest of the agent, M. L. Ritt, was purposely withheld from the knowledge of the defendant, this vitiated the policy, whether material to the risk or not. The court refused so to charge, unless the jury were satisfied that it was material to the risk, and the defendant excepted both to the refusal and the charge. The terms "purposely withheld" are equivalent to intentionally or designedly withheld, which would be a fraudulent concealment; a concealment of a fact material to the question whether the insurer will insure at all, although not material to the risk, would avoid the policy. (*Lynch v. Hamilton*, 3 Taunt. 37, 44. *Murgatroyd v Crawford*, 3 Dallas, 491. *Alsop v. The Com. Ins. Co.*, 1 Sumner, 458. *Burritt v. The Saratoga Mutual Ins. Co.*, 5 Hill, 191. 20 N Y. Rep. 32.) But this view was probably not suggested to the court by the language of the request.

It is, however, well settled, that a fraudulent representation, made by the applicant, though not material to the risk, will have the effect of avoiding the policy, when it is willfully or intentionally made. (1 *Arnould on Insurance*, 500, § 189. 1 *Phillips on Insurance*, § 541. *Parsons on Mercantile Law*, 430.) And the concealment of a fact specifically inquired about will produce the same result, whether it be material or not. (1 *Phillips on Insurance*, § 542.) A fraudulent concealment of a fact not inquired for, when designed or intentional, should be attended with the same consequence. The delinquency of the applicant is the same as in the case of an intentional misrepresentation. The same rule is declared to apply to both cases by Kent. He says, "The question in those cases always is whether there was under all the circumstances a fair representation or a concealment; if the misrepresentation or concealment was designed, whether it was fraudulent; and if not designed, whether it varied materially the object of the policy, and changed the risk understood to be run. If the representation was by fraudulent design, it avoids the policy, without staying to inquire into its mate-

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riality." (3 *Kent*, 351.) Parsons says: If the misstatement or concealment be immaterial, yet if it be intended and willful, it will avoid the insurance. (2 *Parsons' Maritime Law*, 162.)

The result of either of these views of the transaction is that the defendant may avoid the policy. As it is one entire contract, no separation or division of it can be made for the protection of the other interests. (2 *Parsons' Maritime Law*, 163. *Marshall v. Union Ins. Co.*, 2 *Wash.* 357. *Smith v. Empire Ins. Co.*, 25 *Barb.* 497. *Brown v. People's Ins. Co.*, 11 *Cush.* 280.)

The judgment should be reversed and a new trial granted.

[ERIE GENERAL TERM, February 8, 1864. *Davis, Grover and Daniels*, Justices.]

LESLEY vs. JOHNSON and others.

Nothing short of a corrupt and illegal *contract* in violation of the statute will constitute usury. It must be a contract or agreement for the loan or forbearance of money, goods or things in action, by which illegal interest is reserved and taken, or agreed to be reserved or taken. Otherwise usury does not exist.

The reservation of illegal interest, or the taking or agreeing to take unlawful interest, must enter into or become part and parcel of the contract, in order to bring the transaction within the prohibition of the statute.

When a contract for the loan of money, legal and innocent in itself, is once made and consummated, it cannot be made usurious and illegal by any subsequent transactions of the parties.

Though subsequent transactions may of themselves be illegal, and forbidden by law, they cannot impart the taint and the consequences of usury to an antecedent agreement, fair and just and upright in itself.

If the obligation under the agreement is to pay a debt, the obligation, with the legal rights resulting from it, remain in all their force, and cannot be discharged by engrafting upon it a subsequent agreement obnoxious to the charge of usury.

If the subsequent agreement has the effect to annul and rescind the previous agreement, a different rule will prevail.

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Where subsequent to the execution of a bond and mortgage, the mortgagors made an agreement with B. that if he would pay the money due thereon, to the holder of the mortgage, take an assignment thereof, and execute a covenant extending the time of payment, they would pay him a bonus of \$4855.55, which was acceded to by B. and was carried into effect by both parties; *Held* that the subsequent usurious agreement did not taint the mortgage with usury, or constitute a defense to an action to foreclose the same, brought by an innocent purchaser thereof.

A person who does acts, or makes representations or admissions, designed to influence and which do influence the conduct of another, will be precluded from denying such acts and representations when such denial will operate to the injury of the person so influenced by them.

Mortgagors, long after the execution of the mortgage, at a time when B. was about to become the assignee thereof, covenanted with him that there was due and unpaid, upon the mortgage \$27,222.20, and that there was no set-off, defense or counter-claim thereto. Subsequently, by another instrument, they declared and affirmed that \$18,222.20 was still due and unpaid, for principal (\$9000 having been paid in the mean time.) These papers were left with B. and exhibited by him to the plaintiff as an inducement for the latter to purchase the bond and mortgage, one of the mortgagors telling him there was over \$18,000 of principal due, and assuring him he could have no better investment and no better security for his money. Confiding in these representations, the plaintiff took an assignment of the bond and mortgage and paid B. \$18,222.20 for principal, beside the arrears of interest. *Held* that the mortgagors could not be permitted, afterwards, to deny what they had thus asserted to be true. That whatever might be the real estate of the mortgage debt and the sum really due and unpaid thereon, as to the plaintiff and those who might claim under him, the mortgagors were *estopped* from disputing that the money paid by the plaintiff was the true sum due and payable, at the time.

A PPEAL by the defendants from a judgment entered at a special term, for the foreclosure of a mortgage.

John E. Parsons, for the plaintiffs.

B. W. Van Pelt, for the defendants.

By the Court, BROWN, J. The mortgage which this action is brought to foreclose, bears date November 10, 1852, and was given by the defendants, Elias Johnson, David B. Cox and Joseph W. Fuller, to John F. Delaplaine, to secure the payment of the sum of \$35,000, with the interest. The execu-

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tors of the last will and testament of John F. Delaplaine duly assigned the said mortgage, with the bond therein referred to, on the 25th day of Decémber, 1857, to the New York Life Insurance and Trust Company, which company assigned the same to William V. Brady, on the 7th of January, 1858, who afterwards assigned the same to George Lesley, the plaintiff in this action.

The defense set up in the answers is usury ; a corrupt, usurious and unlawful agreement which vitiates and discharges the contract for the payment of the money mentioned in the bond and mortgage, so that it cannot be enforced against the mortgagors or those claiming the premises mortgaged, under them. It is not claimed in the answers that the sum of \$4355.55, which was paid to William V. Brady when he took the assignment of the bond and mortgage, is a payment thereon ; or that it is a set-off or counter-claim which the defendants have the right to have deducted from the amount due for principal and interest upon the bond and mortgage. The answer claims nothing of the kind. It claims and insists that this sum of \$4355.55 was paid to Brady as a premium or bonus for the loan, in addition to the lawful interest to accrue thereon, and that owing to the corrupt and unlawful nature of the contract of loan, nothing whatever is due and payable upon the bond and mortgage. The proof upon the trial also shows that the sum above referred to was given to Brady not as a payment upon the bond and mortgage, but for a very different purpose, to which I shall refer hereafter. I make this explicit statement at the outset, so that it may be seen that a determination of the question of usury disposes of the action altogether.

Usury can only be predicated of a contract. It is an offense or forfeiture created by the statute which declares what shall be the rate of interest for the loan or forbearance of money, goods or things in action, and then proceeds to declare, that "all bonds, bills, notes, assurances, conveyances, and all other contracts or securities whatever, (except bot-

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tomry and respondentia bonds and contracts,) and all deposits of goods or other things whatsoever, whereupon or whereby there shall be reserved, or taken, or secured, or agreed to be reserved or taken, any greater sum or greater value for the loan or forbearance of any money, goods, or other things in action, than is above prescribed shall be void." Nothing short therefore of a corrupt and illegal contract in violation of the statute will constitute usury. It must be a contract or agreement for the loan or forbearance of money, goods, or things in action, by which illegal interest is reserved and taken, or agreed to be reserved or taken. Otherwise usury does not exist. The reservation of illegal interest, or the taking or agreeing to take unlawful interest, must enter into or become part and parcel of the contract, in order to bring the transaction within the prohibition of the statute. When a contract for money, legal and innocent in itself, is once made and consummated, it cannot be made usurious and illegal by any subsequent transactions of the parties. These subsequent transactions may of themselves be illegal, and forbidden by law, but they cannot impart the taint and the consequences of usury to an antecedent agreement, fair, and just, and upright in itself. If the obligation under it is to pay a debt, the obligation, with the legal rights resulting from it, remain in all their force, and cannot be discharged by ingrafting upon it some subsequent agreement obnoxious to the charge of usury. If the subsequent agreement has the effect to annul and rescind the antecedent contract, that is quite another thing. But so long as the latter remains in force, usury cannot be imparted to it by the subsequent agreement. Examined in the light of this theory, the defendants have failed to bring this case within the prohibition of the law of usury. The mortgage, as I have already said, is dated November 10, 1852, and the complaint charges that on the same day John F. Delaplaine, the mortgagee, conveyed by deed the mortgaged premises to the defendants, David B. Cox, Elias Johnson and Joseph W. Fuller, and

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took back from them the mortgage in controversy, to secure the payment of \$35,000 of purchase money with the interest thereon at the rate of seven per cent per annum, at the several times in the mortgage, and bond which accompanied the same, mentioned. This is not denied or controverted in the answer, and there is no charge or pretense that there was any thing usurious or illegal in the sale of the lands, and in the contract for assuring the payment of the purchase money. The usury which is sought to be engrafted on, or rather injected into this contract, occurred some five years afterwards, in an arrangement made between the mortgagors and William V. Brady, the assignee of the bond and mortgage, and after very considerable sums of money had been paid by them on account thereof, and is set out in the answers in substance as follows: "That the said William V. Brady at the time of taking the assignment of the said bond and mortgage from the New York Life Insurance and Trust Company, entered into the following corrupt, unlawful, and usurious agreement with the defendants Johnson, Cox and Fuller, and the defendant John C. Cameron, who had acquired some interest in the lands, that Brady would loan them the sum of \$27,222.20, the sum due on the bond and mortgage at the time of the assignment to him, until the 10th day of November, 1860, provided the said Johnson, Cox, Fuller and Cameron would pay down to him in cash at the time of the assignment the sum of \$4355.55, (being 16 per cent of the sum due on the bond and mortgage,) as a premium or bonus for said loan, in addition to the lawful interest to accrue thereon, and that the same were to be assigned and delivered to Brady by the Life Insurance and Trust Company, and held by him as security for the sum so loaned and for the forbearance to enforce and collect the same, until the 10th day of November, 1860." The proof failed to establish an agreement for a loan of money by Brady to the four defendants named in the answer, or to either of them. The judge found as a fact in the case, what is amply sustained by the

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proofs, that the money paid by Brady to the Insurance and Trust Company upon the assignment of the bond and mortgage to him was not, nor was any part thereof loaned by him to the defendants Johnson, Cox, Fuller and Cameron, or to either of them. That there was no agreement for the loan of said money, or any part thereof, to the said defendants, or to either of them by Brady, nor was the assignment of the bond and mortgage taken to cover up and disguise the true nature and character of the transaction, but was taken on the purchase of the said bond and mortgage by Brady, and on payment by him of the whole amount due thereon to the Insurance and Trust Company. The judge also found as a fact in the case, that the sum of \$4355.55 mentioned in the answer as the premium or bonus for the usurious loan, was paid by the four defendants named, to Brady, and received by him as the consideration and inducement to take such assignment and execute a covenant extending the time for the payment of the principal sum due on the bond and mortgage, and in consideration that he would from time to time release portions of the mortgaged premises which might be sold by the defendants, from the lien of the mortgage. These findings, which are in accordance with the evidence, (some of it given by one of the defendants himself,) dispose of the question of usury against the defendants. They dispose of it as a question of pleading; for conceding the payment of the \$4355.55 to have been illegal, the proof did not correspond with the allegation of the answer, which upon well settled rules it must do to sustain a defense of this character. They also dispose of the defense effectually upon principle, for as there was no agreement for a loan between Brady and the four defendants, as alleged in the answer, there could be no usury unless it could affect and taint with illegality the original contract of mortgage between John F. Delaplaine and the defendants Johnson, Cox and Fuller, which I have already shown it could not do.

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There is one other aspect of the transaction which I notice, to show how unjust and unconscionable the defense is. George Lesley, the plaintiff, is an innocent purchaser of the bond and mortgage, having paid the full value thereof without reference to the \$4355.55 paid to Brady. He purchased at the solicitation of the defendant Cox, who said to him there was something over \$18,000 of principal due, and assured him he could have no better investment and no better security for his money. It also appeared that in the contract of the 7th of January, 1858, referred to in the pleadings and proofs, the four defendants, Johnson, Cox, Fuller and Cameron, covenanted under their hands and seals with Brady that there was due and unpaid upon the mortgage \$27,222.20, and that there was no set-off, defense or counter-claim thereto. And afterwards, on the 1st of March, 1861, by another instrument under their hands and seals, they again declare and reaffirm (\$9000 of the principal having been paid in the mean time) that the sum of \$18,222.20 was still due and unpaid for principal. These papers were left with William V. Brady, and exhibited to the plaintiff as an inducement for him to purchase the bond and mortgage. Confiding in these repeated and solemn representations, on the 18th of July, 1861, he took the deed of assignment and paid William V. Brady therefor \$19,308.30, being \$18,222.20 for principal and the arrears of interest to that date. The defendants will not now be permitted to deny what they then asserted to be true. Whatever might be the real state of the mortgage debt and the sum really due and unpaid thereon, as to the plaintiff and those who might claim under him, the defendants are estopped from disputing that the money paid by the plaintiff was the true sum due and payable at the time. The rule of estoppel *in pais* is founded in the purest morality and justice, and must have a place in every enlightened system of civil jurisprudence. A person who does acts, or makes representations or admissions, designed to influence and which do influence the conduct of another, will be con-

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cluded from denying such acts and representations, where such denial will operate to the injury of the person so influenced by them. The acts and representations of the four defendants, Johnson, Cox, Fuller and Cameron, could have no other design than to influence a purchaser of the bond and mortgage, and impress his mind with the thought that the sum of \$18,222.20 of the principal, with the interest claimed, was actually due thereon, and the legal presumption is that such was their effect. Good conscience and fair dealing demand that they should be held to the truth of what they asserted.

The judgment of the special term should be affirmed with costs.

[KINGS GENERAL TERM, February 8, 1864. *Brown, Scrugham and Lott, Justices.*]

CONNOLLY vs. POILLON.

An employer is responsible in damages to an employee, for an injury resulting from the employer's negligence.

The employee himself is bound to exercise all reasonable care and prudence, and if any injury results through his want of care, or through his own negligence combined with that of the employer, he has no right of action against the latter.

It is the duty of an employer to exercise care and prudence that persons in his employ be not exposed to unreasonable risks and dangers, and the employee has a right to understand that the employer will exercise that diligence in protecting him from injury.

Thus where the plaintiff, who was not a ship carpenter or joiner, or a mechanic of any kind, and knew nothing about the construction of scaffolding, or the forces it would be required to resist, was put into the hold of a gunboat, by his employer, a ship-builder, to remove the chips and rubbish underneath a scaffold; *Held* that he had a right to rely upon the superior knowledge of his employer, and upon his care and prudence that the scaffold was of sufficient strength to insure him against all harm.

Held also, that even though the plaintiff himself, in pursuance of his employer's orders, assisted in piling planks upon the scaffold, which fell, from the

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weight so placed upon it, whereby the plaintiff was injured, he was not chargeable with negligence contributing to the injury, so as to defeat a recovery against the employer.

A PPEAL by the defendant, from a judgment of the city court of Brooklyn, in an action to recover damages for a personal injury.

G. T. Jenks, for the plaintiff.

Gilbert Dean, for the defendant.

By the Court, BROWN, J. The defendant is a ship-builder, and in August, 1861, was engaged in constructing the gun-boat Winona for the government, at the foot of Bridge street in the city of Brooklyn. In the progress of the work staging or scaffolding were placed, under the immediate direction of the defendant, across the vessel from side to side, about midway between the deck and the hold or bottom of the vessel. It was placed upon what the workmen termed spalls, which were cross-pieces of timber extending from side to side of the vessel, and upon which the planks for the scaffolding were laid, there being an upright support under the center of each spall, the ends of which were wedged against the sides of the vessel. Heavy white oak knees were being put into the gun-boat, and men were upon the scaffolding employed in driving and riveting iron bolts through the knees into her sides. A short time before the occurrence which constituted the ground of the plaintiff's action, the defendant with his assistants had piled some plank or lumber upon the scaffolding which was there at the time. Between the scaffolding and the bottom of the vessel there was a space of 4½ feet in which the plaintiff was at work gathering chips and rubbish, by direction of the defendant, at the time he was injured. While in this situation the scaffolding fell and was precipitated into the hold upon the plaintiff, who was taken out insensible and much injured. Neither the spalls nor their upright supports

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were crushed with the weight, and nothing was broken. The testimony left it in some doubt whether the scaffolding fell with the weight put upon it or from the blows given by the workmen while driving and riveting the bolts through the knees, canting and swaying the spalls from their places, or from both causes combined. There was evidence given that a few days previous much greater weight was put upon the scaffolding without dislocating or impairing its position and strength; and two of the witnesses, James Breen and Patrick Rock, testified that when the scaffolding gave way it fell aft, which seems to imply that it was swayed out of its position at the time it gave way. The plaintiff brought his action for the injury in the city-court of Brooklyn, where he obtained a verdict. The defendant moved for a new trial, which was denied, and thereupon he appealed to this court.

The relation between the parties, of employer and employed, the injury done to the latter by the falling of the scaffold, and that it was erected under the immediate direction of the former, are facts not in dispute. Primarily the defendant's liability results from the existence of these circumstances; the presumption being that if the structure had been imperfectly and insufficiently made, for the uses to which it was applied, or overburthened with the weight of the lumber put upon it, or subjected to forces in driving and riveting the iron bolts, it would not have fallen upon the plaintiff. Evidence however was offered and received upon both sides tending to affirm and disaffirm the sufficiency of the structure. And the verdict of the jury must conclude the parties upon this question.

The point made by the defendant, upon his motion to dismiss the complaint, cannot be maintained. It assumes as the law of the case, that when an injury happens to an employee through the negligence of his employer, he is without remedy against the latter. It is doubtless true that the employer is not responsible in damages to one employed for the negligence of another. But his responsibility for his own negligence is settled by adjudicated cases. (*Ryan v. Fowler*,

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24 N. Y. Rep. 410, and the cases there referred to.) The employee himself is bound to exercise all reasonable care and prudence, and if an injury result through his want of care, or through his own negligence combined with that of his employer, he has no right of action against the latter. In determining what would be negligence on the part of the workman, reference must be had to his limited means of knowledge, to his ignorance of the structures, machinery and processes upon which he is employed, and also to the fact that men whose business is the lowest forms of human labor are not given to thought and reflection and foresight. Some one must usually think and reflect and foresee for them. And therefore it is well said in *Noyes v. Smith*, (28 Verm. Rep. 59,) "that it is the duty of the master to exercise care and prudence that those in his employment be not exposed to unreasonable risks and dangers. And the servant has a right to understand that the master will exercise that diligence in protecting him from injury, and also in selecting the agent from which it may arise." In the present case Michael Connolly was not a ship carpenter or joiner. He was not a mechanic of any kind, and knew nothing about the construction of scaffolding or the forces which it would be required to resist. And when put into the hold of the gun-boat by the defendant to remove the chips and rubbish, he had a right to rely upon the superior knowledge of the latter, who was a ship-builder, and his care and prudence that the scaffolding was of sufficient and adequate strength to insure him against all harm.

It appeared by the evidence of Cornelius Poillon, the defendant, that he superintended all the work upon the yard and in building the vessels, and that the lumber or plank spoken of, which was piled upon the platform or scaffolding, had been upon the floor of the vessel. That when the hold was cleared of blocks and rubbish, the men at the work, including the plaintiff, piled the planks upon the platform. This of course was done by his direction. When the judge came to charge the jury the counsel for the defendant asked

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him to instruct them that if the plaintiff aided in piling the plank on the platform or staging, and it fell from the weight of the plank, he was himself guilty of negligence which contributed to the injury, and could not recover. The judge declined so to charge, and the defendant excepted. This involves the same proposition to which I have already referred, and if I am right in thinking that the workmen were authorized to depend upon the care and superior knowledge of the defendant in the construction of the staging, it was no part of the business of the former, and the plaintiff is not chargeable with the negligence which would defeat his recovery in this action.

The order and judgment of the city court should be affirmed, with costs.

[KING'S GENERAL TERM, February 8, 1864. *Brown, Scruggam and Lott, Justices.*]

WILKINSON vs. VORCE and WILBUR.

A copy of a judgment rendered by a justice of the peace, and of the proceedings to recover the same, signed by the justice with his official signature, and proved by the testimony of a witness to be a correct copy, must, in a collateral action, be regarded as proof of the rendering of the judgment, and of the various proceedings by which it was obtained.

One serving a summons issued by a justice of the peace under a special authority given to him by the justice, is to be deemed a constable *quoad* the action, and is prohibited from appearing and acting as counsel for the plaintiff on the trial.

His appearance on the trial is an error for which the judgment and proceedings will be reversed, on appeal. But it will not affect or take away the jurisdiction and authority of the justice to proceed in the action.

The justice having acquired jurisdiction of the person of the defendant, and become completely possessed of the action, by the issuing and service of a summons in the manner required by law, his judgment, rendered in such action, will, until reversed, be valid and effectual, and good authority for the issuing of an execution, notwithstanding such irregular appearance for one of the parties.

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A PPEAL by the defendants from the judgment of a county court, on appeal from the judgment of a justice's court.

A. Wager, for the plaintiff.

W. Brewer, for the defendants.

By the Court, BROWN, J. The defendants were sued before a justice of the peace in the county of Dutchess, for the taking and the conversion of certain articles of personal property. The defendant Vorce was a constable, at the time of the alleged taking, and both the defendants pleaded a justification by virtue of a judgment and an execution issued thereon, which judgment was rendered in an action wherein the defendant Henry Wilbur was plaintiff and one Hiram Wilkinson was defendant, before W. K. Ostrom, a justice of the peace of the county of Dutchess. The plaintiffs in this action obtained judgment, whereupon the defendants brought an appeal to the county court, where the action was re-tried according to the form of the statute, and the plaintiff had a verdict, upon which judgment was entered, and the defendants appealed to this court.

Upon the trial in the county court, the defendants produced and proved by the witness, Henry Killmer, that the paper shown him, which purported to be a copy of the judgment and proceedings which the defendants set up in justification, was a correct copy of a judgment and the proceedings to recover the same, rendered in the action wherein Henry Wilbur was plaintiff and Hiram Wilkinson defendant, by W. R. Ostrom, justice of the peace, on the 31st day of October, 1861, for the sum of \$46.15 damages and costs, for goods and merchandise sold and delivered. The copy of the judgment was signed by the justice with his official signature, from which it appeared that the summons was issued on the 25th of October, 1861, returnable on the 31st of the same month, at ten o'clock A. M. at the house of John Crandle.

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On the last named day it was returned as having been personally served on the defendant therein, on the 25th of October, 1861, by William Brewer, who duly indorsed thereon the service thereof on that day, which said William Brewer, the copy stated, had been deputed by the justice to serve the said summons. The paper also certified that at the time and place of the return of the summons, Brewer appeared and answered for the plaintiff and was sworn, and testified that he was authorized so to appear and answer. It also appeared from the paper that Wilkinson the defendant did not appear; that the plaintiff furnished a written complaint for the goods sold, and examined two witnesses to prove the debt, upon which evidence the justice rendered the judgment.

The plaintiff, upon the trial in the county court, took several objections to this proof. 1st. That there was nothing to show that Brewer had authority to serve the summons, and it should appear that he was deputed in writing. 2d. That there was no proof of the service of the summons. 3d. That if Brewer served the summons under authority, he was thereby a constable *pro hac vice*, and could not appear and act as the attorney for the plaintiff in the action. The county court sustained these objections, and rejected the proof as insufficient to show a valid judgment, but the specific ground of the decision does not appear; whether because the copy of the proceedings and judgment before the justice was not proof of the facts therein stated; or whether because Brewer, who acted as the constable in the service of the process, also appeared at the return thereof as the attorney for the plaintiff. Upon either ground I think the county court committed an error.

The power of the justice over the subject matter of the action, his authority to issue the process, and to deputize a person other than a constable to serve the process, is expressly given by the statute, and not disputed. But the plaintiff contends that there must be actual proof of the power of the deputy, by the production of the written authority required

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by section 191 of the statute, and in addition there must be actual proof of the service, by the production of the written return of the person so deputed and making the service. This is in fact saying that the entries of the justice in the book kept by him for that purpose are not proof of the facts therein stated, and are of no value except as a journal or record for his own information. Section 169 requires every justice of the peace to keep a book in which he shall enter the several facts enumerated under the 15th subdivision of the section, and section 170 declares that such entries shall be made under the title of each cause to which they respectively relate, and in addition thereto he may enter any other proceeding had before him in such cause which he shall think it useful to enter in such book. The next section (171) makes the transcript of such judgment and proceedings, certified by the justice, evidence thereof before any other justice. In the present instance the transcript had not the verification of the county clerk as required to make it absolute and complete, as provided in section 173. But it was proved by the testimony of the witness Henry Killmer, to be a correct copy of the judgment and proceedings before the justice, W. B. Ostrom. In a collateral action it must be regarded as proof that Brewer was deputed to serve the process and did serve it accordingly, and returned it to the justice with his return duly indorsed thereon. It is made evidence by the statute; and of what else can it be the evidence except of the judgment rendered and the various proceedings by which the judgment was obtained?

The case of *Knight v. Odell*, (18 How. Pr. Rep. 279,) affirms that a person serving process under a special authority given by the justice is to be deemed a constable *quoad* the action, and is prohibited from appearing and acting as counsel upon the trial. Brewer was therefore disqualified from doing what he did, and his appearance upon the trial was an error for which the judgment and the proceedings would have been reversed upon appeal. The decision of the county court

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does not regard this circumstance as a mere error or irregularity, but goes to the extent of holding that thereby the justice lost his jurisdiction over the action, and whatever he did therein was *coram non judice* and absolutely void. In *Barnes v. Harris*, (4 Comst. 375,) Judge Gardiner in his opinion assumes it "as a principle to which it is believed there is no exception, that a court having authority to issue process acquires jurisdiction of the person of the defendant, *prima facie*, by the personal service of that process upon him in the manner required by law." The action was commenced against Hiram Wilkinson by the issuing and the service upon him of the summons. This was done by persons having proper authority, and at the time of the return of the summons the justice acquired jurisdiction and became completely possessed of the action, with power to proceed therein to judgment. After that, the appearance of William Brewer who served the summons was a mere error. It did not affect or take away the jurisdiction and authority of the justice to proceed in the action. It afforded good reason for the reversal of the judgment he rendered, upon appeal, but until reversed the judgment was valid and effectual, and good authority for the issuing of the execution upon which the defendants relied as a justification in this action.

The judgment of the county court should be reversed, with costs.

[KINGS GENERAL TERM, February 8, 1864. *Brown, Scrugham and Lott*, Justices.]

**SUYDAM vs. THE GRAND STREET AND NEWTOWN RAIL
ROAD COMPANY.**

It being quite evident that when a cartman's cart and a railway car are progressing side by side in the same direction, with a space of 16 or 24 inches between them, there can be no collision if each adheres to the track which the law assigns to it, in case a collision does occur the presumption of negligence is altogether against the driver of the cart, and not against the conductor of the railway car; the former being able to deviate and depart from his track, which the latter cannot do.

In an action against the railway company, to recover damages for injuries occasioned by the collision, the plaintiff must show that the collision proceeded exclusively from the negligent acts of the defendant, and not from his own negligent acts, or his own negligent acts combined with those of the defendant.

Where it appeared from the evidence, in such an action, that the collision was caused by the imprudent act of the plaintiff in pulling his horse to the left; *Held* that it could not be said he was without fault and did not contribute largely to bring about the collision resulting in his injury; and that the jury should have found a verdict for the defendant.

A PPEAL by the defendant from a judgment of the city court of Brooklyn, entered on the verdict of a jury.

William J. Huff, for the plaintiff.

J. W. Gilbert, for the defendant.

By the Court, BROWN, J. This is an appeal from a judgment of the city court of Brooklyn, entered upon a verdict in favor of the plaintiff for \$1500, and from an order denying a motion for a new trial. The action was for damages for negligently causing a railway car to strike the cart of the plaintiff, from which he was thrown and injured in his person.

It appeared by the proof that there are two railway tracks laid down in the center of First street, in Brooklyn, the carriage way therein being 30 feet wide. The space occupied by the rails is 13 feet 7 inches. The defendant operates a horse rail road upon the street. The plaintiff is a cartman, and at the time of the collision, June 1, 1861, was driving a cart about

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6 feet wide and 8 feet 6 inches in length, standing in front of the platform, and proceeding southwardly along First street, on the westwardly rail road track. The car of the defendant approached the plaintiff, going in the same direction. There is some difference of opinion amongst the witnesses of the plaintiff, as to the rate of speed of the car, some thinking it rapid, others not more rapid than the usual rate, while those of the defendant thought it not over $4\frac{1}{2}$ or 5 miles an hour. In the view I entertain, the difference in the rate of speed is not material. At the distance of some 20 feet from the cart the car bell was rung and the car nearly stopped, or brought down to a walk, on hearing which the plaintiff turned off to the left to allow the car to pass. The car ran some distance slowly, and had gone two-thirds of its length past the cart, and within 18 or 20 inches from it, when the collision occurred, and the plaintiff was thrown from his cart into the street and seriously injured. The cart was heavily loaded with agricultural implements, some of which projected one foot and others two feet beyond the rear or hinder end of the cart, the axle being at the center. The collision occurred between the car and the cart at a point two-thirds of the way from the front part of the body of the latter and the hinder end of the cart, or what is more probable—indeed quite certain—the agricultural implements projecting therefrom, which was the platform of a reaping machine and the handles of two horse hoes. The car is 16 feet long with nine stanchions, there being a distance of 18 inches between the stanchions, the third stanchion from the hind end of the car and the sixth from the forward end being the point of collision. About these facts there is no conflict of evidence, that I can see; indeed many of them are derived from the testimony of the plaintiff, as well as from that of the defendant. For all the purposes of this opinion I assume them to be true. The collision between the two vehicles which resulted in the injury of the plaintiff was not without an adequate cause, which he is bound to explain and establish to the satisfaction of the court, before he

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can be allowed to retain his verdict. This is a burthen which every plaintiff voluntarily takes upon himself when he resorts to a court of justice for redress, and from which neither the court nor the jury have power to relieve him. The latter may give him a verdict, but unless supported by the evidence it cannot be maintained. In cases of this kind the plaintiff must show that the collision proceeded exclusively from the negligent acts of the defendant, and not from his own negligent acts; or his own negligent acts combined with those of the defendant. Both vehicles were going over the street in the same direction, in the exercise of a common right, side by side, when the hinder end of the cart came in contact with the side of the car, and the question is through whose imprudence or want of care did it occur.

This same case, upon substantially the same evidence, was before us at the general term in February last, and we then took occasion to say, "that a cartman's cart is a vehicle which traverses all parts of the street; crossing and recrossing, going backwards and forwards, and turning to the right or to the left at the will of the driver, its passage way limited only by the limits of the street. Not so with a railway car. It is irrevocably fixed to a given track laid down longitudinally with the street. To this line the car must adhere, and from which it cannot be inclined or deflected for any purpose. It is quite evident, therefore, that when a cartman's cart and a railway car are progressing side by side, with a space of 16 or 24 inches between them, there can be no collision if each adheres to the track which the law assigns to it. And if a collision does occur under such circumstances, the presumption of negligence is altogether against the driver of the cart, and not against the conductor of the railway car; for the obvious reason that the former can deviate and depart from his track, which the latter cannot do. One of the two must incline towards the other, or there can be no contact. And as the cart can be inclined and deflected towards the railway car at the pleasure of the driver, or by his indifference or

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carelessness, while the latter is inexorably bound to its iron rail, whatever might be the will or misconduct of its conductor, there can be no other presumption but against the care and good conduct of the cart driver."

Both the cart and the car were proceeding in the same direction, the car on the right, and the cart on the left hand. Two thirds of the car passed the cart without contact, and had there been no change in their relative positions there would have been no contact; that is, if each of them had proceeded directly along the street, and without deviation, the remaining third part of the car would have passed freely and there would have been no collision. And had they inclined towards each other the sides of both vehicles would have become the point of contact. This was not so, however. The side of the car and the end of the cart came in contact. By what means then was the hinder end of the cart brought in contact with the side of the car? The car could be moved forward and backward, but not to the one side or the other. It was not possible to move the car so as to produce the actual result. It was produced by a movement of the cart, and by no other means. The cart with the projecting load was 10 feet 6 inches long, 6 feet of which was behind the axle. If the head of the horse was pulled by the driver to the left, even for a small space, it would place the cart diagonal to the railway, and bring the end of it instantly in collision with the car. That this actually took place may be inferred from the injury done to the third stanchion from the rear of the car, and the broken end of the platform of the plaintiff's cart. It is also proved by the sum of the testimony on both sides. Ben Suydam, the plaintiff himself, testifies, "I was pulling to the left when the collision took place. I knew the car struck my load which projected about two feet to the rear of my cart. I suppose the car struck the tail end of my cart." Patrick McGuinn, a witness for the plaintiff, testified, "the car struck the machinery, I think, on the right hand corner of the tail of the cart with violence. It jarred the plaintiff

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off the cart." Again he says: "the horse was diagonal with the track, and the plaintiff kept the same direction until the collision." William S. Townsend, a witness for the plaintiff, says: "I observed the horse and cart turning off to the left. I saw the horse and part of the cart. The cart was ahead and going the same direction as the car." Ira Buckman, a witness for the defendant, said: "I was standing on the step, (of the car,) on the left side. As we passed my face was towards him, (the plaintiff,) and on a line with the side of the car. My face was 16 or 18 inches from the platform of the reaping machine on the plaintiff's cart, which projected further than any thing on the load; that is, when my face passed the rear of the cart. After I told the car driver to go on, the car began to get under way. Just before the collision the horse swayed to the left, and threw the hind end of the cart against the side of the car. All was done in an instant. This was after I told the driver to start up. This platform projected over the right side of the tail of the cart and lay rather diagonally across the cart, and he stood by the other end of it in front. Our car hit the platform; that was the point of collision. The platform slewed around, the cart rung acting as a fulcrum, and the other end in that way knocked him off the cart. It broke the stanchions of the car, the third one from the hind end, and the sixth from the forward end. It broke out so that a piece fell on the ground." Again he says: "The car stopped within 18 inches or it would have broken another stanchion." George Bennett, another witness for the defendant, said: "The cart continued parallel with the car until we (the car) got nearly two-thirds past the rear end of the cart. Plaintiff was standing on the left hand front corner. I saw him look towards the car; he pulled his horse to the left, and threw the end of the cart into the car. I saw the rear load of the cart coming towards the car as the plaintiff turned his head. It struck the car by the stanchion near the rear." Patrick Malone, a witness for the defendant, said: "When we com-

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menced passing the cart it was perfectly straight with us. I think we were 12 or 13 inches from the rear of the cart." This is the evidence, and it leaves no manner of doubt upon my mind that the accident was caused by the imprudent and mistaken act of the plaintiff, in pulling his horse to the left, as he himself says he did, at the moment of the collision. It is in vain to say, in the face of the evidence, that he is without fault, and did not contribute largely to bring about the collision which resulted in his injury. It was the manifest duty of the jury to find a verdict for the defendant; and failing to do this, I think the city court should have set aside the verdict, upon the motion for that purpose. The remarks of the late Mr. Justice Barculo in the case of *Haring v. The New York and Erie Rail Road Company*, (13 Barb. 15,) are peculiarly applicable to the present case. In speaking upon the duty of nonsuiting a plaintiff, or setting aside the verdict where the plaintiff's own negligence has contributed to the injury, he says: "We cannot shut our eyes to the fact that in certain controversies between the weak and the strong—between a humble individual and a gigantic corporation—the sympathies of the human mind naturally, honestly and generously run to the assistance and support of the feeble, and apparently oppressed. And that compassion will sometimes exercise over the deliberations of a jury an influence, which, however honorable to them as philanthropists, is wholly inconsistent with the principles of law and the ends of justice. There is therefore a manifest propriety in withdrawing from the consideration of the jury those cases in which the plaintiff fails to show a right of recovery."

The judgment, and the order denying the motion for a new trial, should be reversed, and a new trial granted, with costs to abide the event.

[KINGS GENERAL TERM, February 8, 1864. *Brown, Sarugham and Lott, Justices.*]

GRANT *vs.* THE CITY OF BROOKLYN.

The streets of a great city being in constant use by passengers, during the night as well as the day, if the municipal corporation undertakes a work—such as the construction of a sewer—which necessarily renders the street unsafe for night travel, it is bound to avert the danger to passengers by special precautions, such as signal lights and barriers, and even more than these, should they prove ineffectual.

Where a municipal corporation, in opening a sewer in a street, threw the earth upon the side-walk usually traveled by foot passengers, and left it there during the night, without any signal light or barrier, or protection erected around or near it, to warn or turn passengers away from the danger, and the plaintiff, while passing along the side-walk at night, in consequence of the obstruction, fell into a hole and was injured; *Held* that the corporation was guilty of negligence to which the plaintiff had not contributed, and was liable for the injury occasioned thereby.

In an action to recover damages for a personal injury resulting in a loss of services, evidence showing how much the plaintiff was earning from his business, or realizing from fixed wages, at the time of the injury, is admissible.

APPEAL by the defendant, from a judgment of the city court of Brooklyn. The action was to recover damages for a personal injury occasioned by the negligence of the defendant.

J. W. Gilbert, for the plaintiff.

John G. Schumaker, for the defendant.

By the Court, BROWN, J. The case of *Hart and Wife v. The City of Brooklyn*, (36 Barb. 226,) upon which the defendant relies somewhat, has little analogy with the present. It was an attempt to charge the city for a non-feasance—an omission to keep the grate or cover of a vault in the side-walk in repair, by means whereof Margaretta, the plaintiff, was injured. The vault was a private and not a public vault, constructed by and used for the convenience of the owner of the adjoining lot, and this is one of the uses to which the side-walks are appropriated. While passing over the street, upon

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the side-walk, the plaintiff stepped upon the grate or cover, which turned aside or gave way under her weight, and caused her to fall into the opening. The corporation had no notice or suspicion that the cover of the vault was imperfect or out of order, and the case was properly decided upon the principle that a municipal corporation is not liable for damages to an individual injured by an opening in the side-walk, made by the owner of the soil or adjacent land for his own convenience, and protected by a covering imperfectly made, without proof of notice of the insufficiency of the covering, and a neglect thereupon to cause it to be remedied. The distinction referred to in the opinion between the carriage ways and side-walks of the streets, and the duties and obligations of the city in regard thereto, was not, I think, material to the decision; nor do I think it has much application to the question of the liability of the defendant in this action.

The injury to the plaintiff resulted primarily from the opening of the sewer in Fulton street, by the water commissioners, who are the agents of, and act for, the city corporation. The written contract produced and proved by the witness Gamaliel King, does not appear in the case. But I infer from what the witness, who is one of the water commissioners, said, that it was a contract made with them by Holahan & Cottar, for the construction of the sewer in Fulton street. The earth from the excavation was thrown upon the side-walk near the corner of Pierrepont street, and caused the obstruction upon the pathway usually taken by foot passengers. On the night of the occurrence, which was the 1st of November, 1859, the plaintiff with Mr. Perrin, were going from the city hall northerly along Fulton street, on the west side. When they came to the corner of Pierrepont street, where the obstruction was, there was no signal light and no barrier or protection erected around or near it to warn or turn passengers away from the danger. Mr. Perrin went on the top of the mound of earth, while the plaintiff kept on the inside of the walk next to the buildings. The side-walk was

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flagged in the center and the flags were covered with the earth of the excavation. When he came within 20 feet of Pierrepont street he could see no light. The pile of earth shut it out, and he could see nothing below his waist, and he felt his way along with his feet. He walked on the strip of ground between the flagging and the fence, and when within about thirty feet from Pierrepont street he fell into a hole formed by the earth of the side-walk caving away. He put his hand against the fence for support, when it gave way also, and he fell into a cellar being excavated upon the adjoining lot and inside the fence. In this fall he sustained the injury complained of. The persons employed in digging the cellar made no excavation outside of the fence until the month of February or March after the accident. It is quite manifest, I think, from this statement, which was not controverted, that the earth thrown upon the side-walk from the sewer, was the leading cause of the injury. True the digging away the ground inside the fence for the cellar, the caving in of that part of the side-walk next the fence, and the falling down of the fence upon which the plaintiff endeavored to support himself, also contributed to the injury. Still it is quite apparent that the plaintiff was led if not forced to grope his way along the inner edge of the side-walk by the incumbrance placed thereon, and the absence of any light to guide or warn him of the danger. The excavation for the cellar and the caving in of a part of the side-walk were contributing but not primary causes of the injury. Had there been no obstruction of the passage way by the earth thrown from the sewer, the defendant would hardly have been open to the charge of negligence. The liability of municipal corporations for injuries resulting from negligence, whether of omission or commission, has been definitively settled by the cases referred to on the plaintiff's points, and the only question in this class of actions open to discussion is whether there is negligence, to which the plaintiff has not contributed, resulting in the plaintiff's injury. The plaintiff was rightfully and properly in

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the street. The defendant had undertaken a work which necessarily rendered the street unsafe for night travel. The danger arises from the very nature of the improvement; and as the streets and thoroughfares of a great city, such as Brooklyn is, are in constant use by passengers, during the night as well as the day, the corporation are bound to avert these dangers by special precautions, such as signal lights and barriers, and even more than these, should they prove inefficient to prevent disaster. The officers having charge of the sewer excavation did nothing of the kind. The men threw the earth upon the side-walk and there left it, and this act supplemented by the excavation inside the adjoining lot, produced the result of which the plaintiff has just ground to complain.

The first request of the defendant to the court to charge the jury proceeds upon the idea that the caving in of the side-walk was the cause of the injury, and unless the city had notice of it, actual or presumptive, it is not responsible. The caving in of the side-walk doubtless aggravated and perhaps contributed to the injury. But it was not its primary cause, as I have endeavored to show, and therefore I think the court were right in declining so to instruct the jury. The law of the road, to which the defendant referred in the second request to charge, refers exclusively to travelers in carriages meeting upon a public highway, and does not regulate the conduct of persons passing over the side-walks of a city.

The business of the plaintiff, it appeared, was that of putting up gas and calcium lights, at the time of the accident; and he testified that he was for a year thereafter unable to attend to his ordinary business. He was then asked by his own counsel what was his net income the year preceding the injury. This inquiry was objected to by the defendant's counsel. The objection was overruled and the defendant excepted. The loss of his services to the plaintiff certainly was the proper subject of proof, but it would have been of no value unless accompanied by some evidence to show what they were worth. I see no other way of doing this so cer-

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tainly and effectually as by showing the net income of the plaintiff for services for the preceding year. This received income was a fact, and although inconclusive, yet it afforded some data from which the jury might estimate the amount of the loss. Suppose that in place of working for himself, the plaintiff had been employed by others during the previous year at a fixed compensation, it would have been competent for him to prove how much that fixed compensation was. In principle there is no difference between the two cases. Indeed where the damages are for the loss of services, I see no evidence so unobjectionable and so reliable as that which shows how much the party was earning from his business, or realizing from fixed wages, at the time to which the loss refers.

The judgment of the city court should be affirmed, with costs.

[KINGS GENERAL TERM, February 8, 1864. *Brown, Saragham and Lott, Justices.*]

EVERITT and others vs. EVERITT and HOYT, executors &c.,
and others.

Practice, and rules of evidence, upon a proceeding under the statute, to establish the execution and validity of a will alleged to be lost or destroyed; and what will be deemed sufficient proof of the execution, and the provisions, of the will.

The proof of a lost or destroyed will proceeds upon the theory that it is not in existence and cannot be produced before the surrogate. Hence the case is one of secondary evidence exclusively.

Proof will also be received to supply the imperfection of memory of the subscribing witnesses.

A proceeding under the statute, to prove a lost will, is not within the spirit or the letter of the 52d section of the statute of limitations applicable to suits in equity, requiring bills for relief, in case of the existence of a trust not cognizable by the courts of common law &c. to be filed within ten years after the cause of action shall accrue.

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THIS was a proceeding in equity under the statute (2 R. S. 67) to take proof of the execution and validity of a lost or destroyed will, and to establish the same.

T. McKissock, G. O. Hulse and Charles C. McQuoid, for the plaintiffs.

John G. Wilkin and E. A. Brewster, for the defendants.

BROWN, J. The object of this action is to establish the execution and validity of the will of Walter C. Everitt, which is alleged to have been lost or destroyed. The deceased was a resident of Middletown, in the county of Orange, at the time of his death, which occurred on the 19th of January, 1842. The will is said to have been dated on the 11th of January of the same year, and witnessed by Henry S. Beaker and David Hoyt, both of the same place, and that Lewis H. Everitt and Harvey Everitt were the persons named as executors therein.

In proceeding to consider and apply the evidence to the allegations of the complaint, it is to be observed that the formalities or acts—several in number—which the law requires to constitute a valid will are to be proved in the usual way, as other facts are required to be proved to make them evidence in a court of justice. While the statute prescribes rules to be observed in the execution and publication of wills which it does not prescribe in regard to the execution and delivery of other written instruments, the proof of the several acts so prescribed is the same as the proof required to establish any other fact. Thus if the instrument to be proved is in existence and within reach of the process of the court, it must be produced in court. If lost or destroyed, or its production from any cause becomes impossible, and that appears to the satisfaction of the court, secondary evidence may be resorted to. If there are witnesses to the execution of the instrument, who have subscribed their names as such (and without subscribing witnesses se-

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lected by the testator himself a will has no force,) they must also be produced and examined, if living and within the power of the court. If they be dead or beyond the jurisdiction of the court, secondary evidence may also be resorted to in this contingency, and proof taken of their handwriting. So if the witnesses when produced and examined have lost all recollection of the transaction, and especially of the extrinsic facts, other evidence may be again summoned to supply the imperfection of the witnesses' memory. For example, when the witnesses cannot recall to memory the circumstance that they subscribed at the request of the testator, that fact stated in the attestation clause will be some evidence to show that such a request was made. And if the witnesses are men of good character, and there is no doubt as to their signatures, or any other suspicious circumstances, the attestation clause would be deemed sufficient evidence of a request. In short the law lays down no stubborn inflexible rules in such cases, but accepts the best evidence that can be procured adapted to the nature of human affairs, human infirmities and casualties, which tends with reasonable certainty to establish the fact in controversy. The proof of a lost or destroyed will proceeds upon the theory that it is not in existence and cannot be produced before the surrogate, and therefore the case is one of secondary evidence exclusively.

It is not disputed that the deceased was a resident of Middletown at the time he died, and that he expired at the house of his brother in law, Harvey Everitt, at that place, on the 19th of January, 1842, then being of the age of 21 years and upwards, without wife or children, leaving his father, Walter Everitt, and various other relatives surviving him. Henry S. Beakes states in his evidence that he knew the deceased, and was present with him in his illness from six to 15 days before his death, in a bed room adjoining the sitting room at Harvey Everitt's house. He was invited to come there by Walter Everitt, the father of the deceased. He saw Mrs. Sally A. Everitt at the house, and no one else

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that he recollects. He remained at the house about two hours. While there he received instructions, which he wrote down, from the deceased, for a will, which he then drew in his own handwriting. This will may or may not have been executed; he has no recollection that it was, and none that it was not executed. Nor has he any memory what became of it. He remembers the will contained directions for building a vault upon land at Middletown, and a bequest of the one half of a horse called Jack, to his father, Walter Everitt, who owned the other half. He examined amongst his papers for the will, but was unable to find it. In respect to Mr. Beakes's presence in the sick room of the deceased at the time he mentioned, he is corroborated by the evidence of Harvey Everitt, Sally A. Everitt and Mary Jane Kinsey, who saw him there engaged writing in the presence of the deceased. David Hoyt, who is said to be the other subscribing witness, was sworn and examined, and said he had no recollection whatever of witnessing the will. There is always some reason to think that the will of a deceased person will find its way into the possession of some of those named in it as executors. Lewis H. Everitt and Harvey Everitt are the executors alleged to have been appointed in the will in controversy. The former is dead, and his son, Samuel L. Everitt, was examined as a witness and said he was one of his father's executors. After his father's death, which was in October, 1846, he found amongst his papers an instrument purporting to be the will of Walter C. Everitt. It covered two pages of paper. He knows the handwriting of the deceased, and of Henry S. Beakes and of David Hoyt. The will was signed with the name of Walter C. Everitt in the handwriting of the deceased, was witnessed by Henry S. Beakes and David Hoyt as subscribing witnesses, in their own handwriting, and the body of the will was also in Mr. Beakes's handwriting. He also stated the contents of the instrument, which corresponded substantially with the copy to which I will refer hereafter. A few months after his

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father's death he gave the will to his grandfather, Walter Everitt. Sally A. Everitt, the sister of the deceased, and wife of Harvey Everitt, remembers the visit of Mr. Beakes at her house, upon the occasion of her brother's last illness. She heard him reading a paper to the deceased in the bed room. When Mr. Beakes announced that he was ready, she, together with David Hoyt who had been in the sitting room some time before that, entered the bed room. She assisted to raise her brother up in the bed, procured a book for him to write upon. Saw him sign his name; heard him declare the paper to be his last will and testament, and ask Mr. Beakes and Mr. Hoyt to sign their names as subscribing witnesses, and saw them sign their names accordingly in the deceased's presence. The deceased requested Mr. Beakes to take the will with him, who thereupon folded it up, put it in his pocket and took it away with him. The next week after her brother's death, Mr. Beakes, Mr. Hoyt, Harvey Everitt, Walter Everitt, Freelove Kirk and herself were present at her house. Mr. Beakes came there at the request of her father Walter Everitt. While there he procured and read what purported to be the will of her deceased brother, and took it away with him again. Some two or three weeks afterwards her husband, Harvey Everitt, brought home with him what purported to be the same will. She and her husband took two copies of it, which she assisted him to compare and found them correct. One of these copies she gave to her father, and the other is that now produced in court. That given to her father she has not seen since. Harvey Everitt, the husband of Sally A. Everitt, recollects the time referred to by Henry S. Beakes when he prepared the will. He saw the latter in the room with the deceased, writing. Walter Everitt, the father of the deceased, David Hoyt and his wife, Sally A. Everitt, were in the adjoining room. He did not see the will executed. After the death of Walter C. Everitt he was present at his own house at the time referred to by Sally A., when Mr. Beakes read the will. He heard it

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read and knew its contents. The latter took the paper away with him. He afterwards obtained the paper from Mr. Beakes and took it to his own house, where it remained some three weeks. While there, with the aid of his wife, he took two copies of the paper, one of which he produced in court. He compared it with the original (so called) and knows it to be correct. He is acquainted with the handwriting of the deceased as well as that of Henry S. Beakes and David Hoyt. The signature Walter C. Everitt to the instrument was in the handwriting of Walter C. Everitt, and the body of it as well the name Henry S. Beakes, signed as subscribing witness, was in Mr. Beakes's handwriting, and the name David Hoyt, also signed as a subscribing witness, was in the handwriting of David Hoyt. The instrument was returned by him to Henry S. Beakes, and he saw it no more. This witness also remembered the contents of the paper read by the latter at the witness' house, independent of the copy, and they corresponded in all respects with the copy produced.

This is a substantial summary of the evidence produced upon the trial. There also is the evidence of the person who drew the will, but who does not recollect its execution or non-execution. There is also the evidence of three witnesses who saw him at the time and place to which he refers, and there is also the evidence of three witnesses, who saw David Hoyt, the other subscribing witness, there at the same time. There is also the evidence of two witnesses who were present a few days after the decease of Walter C. Everitt, and heard Henry S. Beakes read the paper he produced as the will of Walter C. Everitt. Mr. Beakes is a man of undoubted veracity and high character, accustomed to the transaction of business, and incapable of doing as he is proved to have done, unless the paper he read was the will of the deceased, executed according to the forms of law. But this is not all. We have also the evidence of a witness of undoubted credibility who saw her brother, the deceased, sign a will, publish it to the witnesses Henry S. Beakes and David Hoyt, and ask them to become

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subscribing witnesses thereto, which they did in her presence. We have also the testimony of two witnesses who know the handwriting of the testator as well as that of both the attesting witnesses, who saw it after the death of the former a number of times, and who prove the genuineness of the signatures of the testator and the witnesses, as also the body of the instrument to be the handwriting of Mr. Beakes. And further, there is to the copy produced a full attestation clause which asserts that the essential requisites of the statute were observed in the execution of the instrument. It is a fact worthy of notice that both the original paper and one of the copies spoken of by Sally A. Everitt passed into the hands of Walter Everitt, the father of the deceased. They have not been seen by any of the witnesses since. Walter was heir at law and was also entitled to the personal estate in the event of his son dying intestate. He had therefore no pecuniary interest in the preservation of these papers.

The proof is positive, clear and uncontradicted; nothing could add to its force but the production of the instrument itself. The 74th section of the statute requires that it shall be proved to have been in existence at the time of the death of the testator, and that its provisions shall be clearly and distinctly proved by at least two credible witnesses, a correct copy or draft being deemed equivalent to one witness. This in my opinion has been done; and unless there is some bar or legal impediment in the way, the plaintiffs are entitled to a decree or judgment that the will be established and admitted to record.

This bar the counsel for the defendants claim to be the lapse of time—the statute of limitations. More than twenty years elapsed from the death of the testator, Walter C. Everitt, to the commencement of these proceedings, and they therefore insist that it falls within the principle of the ten years' limitation. The loss of a deed or other written instrument is not always a ground for relief in a court of equity; for although a party may be entitled to a discovery of the original existence

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and validity of the deed, courts of law may afford just the same relief, since they would receive evidence of the loss and contents of the deed, just as a court of equity would do. To enable a party therefore to claim equitable relief he must establish that there is no remedy at law, or no remedy which is adequate and adapted to the circumstances of the case. (1 *Story's Eq. Juris.* 84.) When, however, there are other equities calling for the action of the court besides the establishment of the deed, then the equity courts will entertain jurisdiction and grant the appropriate relief at the same time. The 70th and 71st sections of the general provisions of the revised statutes applicable to wills, were intended to confer upon the court of chancery authority to take proof of the execution and validity of lost wills, and to establish the same as distinct and independent of the other equities calling for the relief referred to by the last named writer. Section 70 declares that "whenever any will of real and personal estate shall be lost or destroyed by accident or design, the court of chancery shall have the same power to take proof of the execution and validity of such will, and to establish the same, as in the case of lost deeds." (2 *R. S.* 67.) And section 71 declares that when so established by the decree of the court, such decree shall be recorded by the surrogate, and letters testamentary or of administration, with the will annexed, shall be issued by him in the same manner as upon wills duly proved before him. No other equities or other ground for equitable interference need be stated in the complaint but the loss or destruction of the will; and the final decree when the plaintiff prevails is limited to its being established and admitted to record.

In *Bowen v. Idley*, (6 *Paige*, 46,) the chancellor remarks incidentally, that "before the revised statutes the court had jurisdiction in a suit brought to establish a will of real estate which had been fraudulently destroyed, either during the life of the testator or afterwards, without his knowledge or consent, or when he was mentally incapable of consenting. And

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the jurisdiction of the court [he remarks] is now extended by statute to the case of a will of personal estate." If he intended to say that such was the jurisdiction of the court, without the qualification referred to by Judge Story, it is open to very grave doubt. There must, I think, have been other equities dependent upon and resulting from the establishment of the instrument to warrant the interposition of the court. Nor is the new remedy given by the statute confined to wills of personal estate. Its provisions are general, embracing, by express words, wills of real and personal estate, with this most weighty direction, that the decree establishing the instrument shall be recorded by the surrogate, and it thus becomes his authority for issuing letters testamentary or of administration with the will annexed, in the same manner as upon wills duly proved before him. I can hardly be mistaken in thinking this a new power conferred upon the court. (*See also the cases referred to in Colton v. Ross*, 2 Paige, 396.)

In support of the defense of the statute of limitations, I am referred by the counsel for the defendants to the case of *Bucklin, admin'r, v. Ford, executor &c.*, (5 Barb. 393.) This case is authority for the rule that the statute of limitations does not begin to run against an action which accrued in favor of the estate of a deceased person, after his death, until there is some person in existence capable of suing, or at least some person to whom the right of action may accrue. Applied to the present case it will put it out of the power of those who may have taken and appropriated the personal property of Walter C. Everitt to their own use, after his death, to plead the statute with effect in an action to recover the value thereof, until six years shall have elapsed after the granting of letters testamentary upon the proof of his will. I cannot perceive that this authority has any application whatever to the present case. Its influence (if any) is rather adverse to the defense; for if the statute does not run against a claim to recover the personal estate of the testator, wrongfully taken or appropriated after his death, until the appoint-

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ment of his personal representative, no good reason can be assigned why it should run against a proceeding which has no other object or purpose but to qualify and clothe some one with the legal authority to assert a claim and bring an action to recover the converted property. The 52d section of the act prescribing the time for the commencement of suits in courts of equity, (2 *B. S.* 2d ed. 229,) is in these words: "Bills for relief, in case of the existence of a trust not cognizable by the courts of common law, and in all other cases not herein provided for, shall be filed within ten years after the cause thereof shall accrue, and not after." This provision is manifestly applicable to bills filed for relief exclusively. The words are "bills for relief, in case of the existence of a trust not cognizable by the courts of common law, and in all other cases not herein provided for," &c. The antecedent words, "bills for relief," applying to all the cases which can possibly arise under the provisions of the section. The men who framed these statutes, several in number, were not only accurate and exact practitioners in the courts, but were amongst the most eminent jurists of their own times. They doubtless employed the words "bills for relief," in the statute, in their strict legal and technical sense, and had in mind the obvious distinction to be found in the books upon equity pleadings between bills which pray for relief and those which do not pray for relief. "In a broad sense," says Mr. Story, in his treatise upon Equity Pleadings, "all bills in equity may be said to pray for relief, since they seek the aid of the court by some decree or decretal order to remedy some existing wrong or apprehended wrong or injury. But in the sense in which the words are used in courts of equity, such bills are deemed bills for relief which seek from the court in that very suit a decision upon the whole merits of the case set forth by the plaintiff, and a decree which shall ascertain and protect present rights or redress present wrongs. All other bills which merely ask the aid of the court against possible future injury or to support or defend a suit in another court of ordi-

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nary jurisdiction are deemed bills not for relief." He says the distinction is not formal merely but substantial, involving the most important consequences. He gives as an example of bills not praying for relief, those filed to perpetuate testimony and to examine witnesses *de bene esse*, bills of discovery of facts resting within the knowledge of the party against whom they are exhibited, or the discovery of deeds, writings or other things in their custody or power. (*Story's Eq. Plead.* 17, 19.) The complaint in the present action prays that the execution of the will may be proved and its validity established to the end that it may be admitted to record, and nothing else. It does not seek to restrain the defendants from doing any future acts, nor to establish any rights or redress any wrongs to property. It seeks to recover no money or articles of personal property, or to recover and be let into the possession of real estate. In short it asks no relief, in the technical sense of the word, against any of the defendants. It is not a case within the spirit as it certainly is not within the letter of the statute concerning the commencement of suits in courts of equity to which I have referred.

The plaintiffs are entitled to a decree or judgment that the will be established and recorded as the will of Walter C. Everitt, by the surrogate of the county of Orange. The taxable costs of the parties who have appeared and answered to be paid out of the estate of the deceased Walter C. Everitt, in the usual course of administration.

As Darwin Everitt and S. Genevieve Everitt have no interest in the estate or will of the deceased, Walter C. Everitt, the complaint as to them is dismissed.

[ORANGE SPECIAL TERM, March 8, 1864. *Brown, Justice.*]

HUTCHINGS vs. MUNGER.

S. sold a canal boat to H. for \$2400, a part of which was paid down, and the balance was secured by the promissory notes of H. payable at future periods. H. was to have possession of the boat, but the title was to remain in S. until the notes were paid. In April, 1860, some of the payments due from H. being in arrear, S. directed the boat to be sold at auction. He had previously waived the technical forfeiture arising from failure to pay at the day, by accepting a payment from H. and by treating him as a purchaser still holding under his contract. Previous to the sale H. tendered to S. the amount due upon the contract. *Held* that such tender was equivalent to performance by H., and the effect of it was to take away from S. the right to proceed and sell the boat as upon a forfeiture, and to put H. in the position he occupied before any forfeiture could be claimed.

Held also, that S. occupied substantially the position of a mortgagee or pawnee of the property, and upon H.'s failure to pay, he had a right to resume possession and sell the property—a right equivalent to that of foreclosure by a mortgagee, or sale by a pawnee; but that right could be defeated by performance, or an offer and tender of performance, before or after the stipulated day; such a tender standing in the place of, and being equivalent to, performance.

Held further, that H. was by his tender, remitted to his original rights, and entitled to the possession of the boat, in the same manner that he would have been upon an actual performance. And that the sale of the boat by S. was improper, and the dispossession of H. illegal.

A PPEAL from a judgment entered upon the report of a referee. The action was brought to recover damages for the conversion of a canal boat. The referee found the following facts, viz: That on the 17th September, 1856, one George Silence sold to the plaintiff the canal boat in question, for the sum of \$2400, a part of which was paid in hand and the balance was secured by the notes of the plaintiff, falling due at different times thereafter, the last one falling due on the 10th November, 1858. The sale was conditional, and the plaintiff was to have possession and use of the boat, but the title was to remain in the vendor unless the notes and contract were paid as they fell due respectively. The contract and notes were shortly after assigned by Silence to the defendant, who had advanced money to him, and who therefore became and thereafter continued to be the owner of the notes

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and contract and boat, subject to the conditions of the sale. Payments were from time to time made upon the notes and contract to the defendant after the assignment, but not as fast as they became due, and at the time the last note and payment fell due, the plaintiff was in arrears to the amount of \$800 or \$1000, being 10th November, 1858. The plaintiff was allowed to retain possession of the boat, and used the same until the 15th day of November, 1859, when he paid and the defendant received as payment thereon the sum of \$281. This sum was paid upon the arrangement and agreement between the parties that the defendant in consideration thereof was to have the seasons of 1860 and 1861 in which to pay the balance of the purchase money. The plaintiff retained possession of the boat thereafter and laid her up at Oswego during the winter succeeding the payment, having a boat-keeper on board. In April, 1860, the defendant authorized one Lake, residing at Oswego, to advertise and sell the boat at auction for the balance remaining due and unpaid on said notes and contract. Prior to the day of sale the plaintiff called on the defendant at Rochester, for the purpose of paying or arranging the amount then due and unpaid on the notes and contract. This was on April 7, 1860, and the defendant then told the plaintiff the boat was advertised for sale at Oswego, to be sold on the 9th April, and his papers had been sent to his agent there; that he must go there and see his agent, Mr. Lake, who would figure up the amount due. In pursuance of this the plaintiff proceeded to Oswego on the 9th day of April, and there tendered and offered to pay to the defendant's agent, Lake, the sum of \$1065, \$500 being in a check upon the Lake Ontario Bank at Oswego, of Penfield, Lyon & Co., and the balance in the bills of the bank. Lake refused to receive the same, upon the sole ground that the amount was not sufficient to pay the sum due on the contract. The offer of payment was therefore refused, and the boat was thereupon sold and bid off for the defendant for \$1200. About twenty days thereafter, the boat and furni-

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ture were taken by the defendant from the custody of the plaintiff, and the boat was afterwards sold by him for the sum of \$1559. The value of the boat, at the time of the sale, was \$1850. The value of the furniture was \$65. The amount due and unpaid on the notes and contract, at the time of the sale, was \$791.63. The referee further found that prior to and on the day of sale by Lake, and after Lake had informed the defendant by telegraph of the tender, the defendant telegraphed to Lake not to take from the plaintiff less than \$1200. The referee found as conclusions of law that under the circumstances of the case as proved, the plaintiff had a legal right on the 9th of April, 1860, to pay or offer to pay to the defendant the amount due and unpaid upon the contract and notes with the expenses incurred in the proceedings to sell the boat, and upon making such tender or offer of payment was entitled to the possession and ownership of the boat as if his contract had been fully performed. That the tender and offer of payment was good and sufficient, the objection thereto having been put distinctly and solely upon the ground of its not being sufficient in amount. The said referee found and decided further as follows: That the tender of \$1065 was sufficient to cover the whole amount due and unpaid on the contract. The defendant requested the referee to find that Lake had no right to waive the production of the specie, and to accept bank bills and a check as legal tender. The referee decided that the defendant having instructed his agent not to take less than \$1200, and the agent having refused the tender on the ground that the amount was not sufficient, the question of the rights of the agent to waive the tender of specie was not involved. He therefore refused so to find, and the defendant excepted to such refusal. The referee further decided that although the agreement made by Silence to postpone the payment may not have been a legal and binding contract, the fact that such agreement was made, the money paid to Silence, and received by the defendant, who was notified of the agreement, tended to show a waiver by the defendant of the

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forfeiture of the contract. The referee further decided that the defendant waived the forfeiture made by the plaintiff of the legal contract; that a note of \$150 having been taken up by one Bissell, at the plaintiff's request, the same was a payment to that amount on the contract; that the note due June 1st, 1857, having been produced on the trial by the plaintiff, was sufficient evidence of the payment of the same by him. The referee further found that the plaintiff was entitled to recover of the defendant the difference between the value of the boat and furniture and the amount remaining due and unpaid upon his notes and contract. That such difference was the sum of \$123.37, with interest from the ninth day of April, 1860, to the date of his report, being the sum of \$203.57; and the referee directed judgment for the plaintiff and against the defendant, for \$1325.94, besides costs.

J. L. Angle, for the appellant.

J. Noxon, for the respondent.

By the Court, BACON, J. It is not a matter of much moment whether the sale of the boat by Silence to the plaintiff was, as it is styled by the learned referee, a "conditional sale," or whether it was, as is claimed by the counsel for the defendant, an "executory agreement for a sale." It was in essence a contract of sale; the important fact being that delivery of possession was made to the plaintiff, which he was to retain until the purchase price was fully paid, and when that was done the title became perfect in the plaintiff. If the plaintiff was entitled to continue in the possession of the boat, and had incurred no absolute forfeiture at the time the defendant directed it to be sold, then he was improperly and illegally dispossessed of the property, and could maintain trespass for the damages he has sustained, or trover for the recovery of the property. The question then is, what were the rights of the respective parties on the 9th day of April, 1860, when the defendant undertook to assert what were

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claimed to be his rights, and seized and sold the boat. At that time there were confessedly payments in arrear upon the contract price of the boat, and by the strict terms of the agreement the defendant had the right to enter upon and take possession of the boat. It is true the plaintiff alleges and proves that he had made an agreement in November, 1859, that in consideration of a payment then made he was to have an extension of time upon the balance of the purchase money for the two seasons ensuing. As an agreement, this probably had no binding force and effect, since the part payment of a debt already due forms no sufficient consideration for a promise to extend the time of payment of the residue. But the proof was competent in another aspect, since it tended to show, and was indeed pretty persuasive evidence of, a waiver of the forfeiture of the contract which the defendant might otherwise have insisted upon. And indeed the whole conduct of the defendant, down to the hour of the sale, shows that he did not intend to insist upon the forfeiture, which by failure to pay the stipulated sums at the times they respectively fell due, the plaintiff had technically incurred. When called upon at Rochester he obviously treated the plaintiff as a purchaser still holding under his contract, and directed him to repair to his agent at Oswego, who would inform him of the amount he would be expected to pay to fulfill the contract of purchase. The position of the plaintiff, then, on that day, (9th of April, 1860,) was, I apprehend, the same as it would have been had there been no forfeiture: and the inquiry then is whether he then made a valid and sufficient tender, both in point of form and in respect to amount; and whether what he then did amounted to or was equivalent to performance, by which his title was in substance perfected, and his right of possession continued.

The referee has found as a conclusion of law that the tender was good and sufficient, and the facts fully sustain this finding. It was made before the sale, to the agent of the defendant at Oswego, to whom he had sent the papers and a

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power of attorney to make the sale and do all things needful therein, and to whom also he had expressly directed the plaintiff, when he came to him to ascertain the amount, and satisfy the claims on the boat. It was unqualified by any conditions, and although not in specie no objection was made to it on that account; the agent declining to receive it upon the sole ground that it was not sufficient in amount. That it was sufficient in amount appears clearly by the computation, which shows that on that day considerably less was due on the contract.

As a result of this finding, and of the conclusion that the position of the parties was such that the plaintiff had the legal right on the 9th of April to pay or offer to pay to the defendant the amount due upon the contract, the referee concludes that the plaintiff was thereupon entitled to the possession and ownership of the boat, or, in other words, that the tender and offer to pay, although refused, was equivalent to performance. If right in this, the judgment, with an exception I shall hereafter notice, is right. The defendant's counsel contest the position, and insist that a tender, even conceding it to have been sufficient in all respects, as to form and substance, did not revive the possession of the plaintiff, or give him any right to the boat. He claims that the only result of the unaccepted tender would be to give the plaintiff a right of action for a breach of the contract. If this is all it would prove but a very inadequate remedy, and for aught I can see he would have the right, entirely independent of the tender. I apprehend, therefore, that the true rule is much more comprehensive than this, and that in this case, as in some others, the proposition is true in law, that "tender is equivalent to the performance." The effect of it, if good, as we have seen that it was, is to take away the right to proceed to sell as upon a forfeiture, and to put the plaintiff in the position he occupied before any forfeiture could be claimed. It has the same effect that a tender of the amount due upon a mortgage has, although after the "law day," to wit, to discharge the

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lien and prevent a foreclosure. This is the principle established in the case of *Kortright v. Cady*, (21 *N. Y. Rep.* 343,) in respect to a mortgage upon real estate; and the reason and the rule are both the same in this case.

In deciding that case the court discuss the general effect of a tender, and show that it extends to a contract in relation to personal property, as well as real estate. Thus it is said that a tender of rent makes a distress unlawful although it is not made until after the rent day. In relation to goods pledged, if the money for which they are pledged be tendered, the special property of the pawnee is determined, and it is laid down by Baron Comyn (*Dig. tit. Mortgage, A.*) that if the former refuse to restore the pledge, trover lies against him. The instantaneous effect is said to be to discharge any collateral lien as a pledge of goods, or the right to distrain. If the creditor refuses to accept he justly loses his security. "It is impossible," says Comstock, J. "to hold otherwise, although the tender be made after the day, unless we also say that the mortgage which was before a mere security, becomes a vested estate by reason of the default. (*Kortright v. Cady*, 21 *N. Y. Rep.* 366.) The same reasoning applies here. The defendant occupies substantially the position of a mortgagee or pawnee of the property. Upon failure to pay by the plaintiff pursuant to the contract, he had a right to resume possession and sell the property—a right equivalent to that of foreclosure by a mortgagee or sale by a pawnee; but as in these cases so in the one before us, that right could be defeated by performance, or an offer and tender of performance before or after the stipulated day, and the tender if sufficient and superior to all legal exception, stands in the place of and is equivalent to performance. That was the condition of these parties, and it accordingly follows that the plaintiff was by his tender remitted to his original rights and entitled to the possession of the boat, in the same manner that he would have been upon an actual performance. The sale was consequently improper, and the dispossession wholly illegal.

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But although right in principle, as I think, the referee has committed an error in reference to the amount of the judgment, which requires to be corrected. He held that the plaintiff was entitled to recover the difference between the value of the boat and furniture and the amount remaining unpaid upon the contract. It does not appear what became of the tender, but the defendant should in some way be entitled to the benefit of it, and this can only be by allowing the amount and deducting it from the value of the boat and furniture, and giving judgment for the balance. It was not necessary for the plaintiff to bring the money into court under an allegation of *tout temps prist*, for this is not required when the effect of the tender is only to discharge the lien, and not to extinguish the entire liability. (*Kortright v. Cady*, 21 N. Y. Rep. 354.) The creditor by refusing to accept does not forfeit his right to the thing tendered, but he loses his collateral rights or securities. The tender was a concession by the plaintiff that so much was due, and this could not be withdrawn and the defendant lose the benefit of the offer, and he was entitled to that amount whether due or not. As the effect of the tender was to destroy the right of the defendant to the possession of the boat, it follows that he is entitled to that which accomplished that object. The difference between the sum tendered and that found by the referee as the balance due, is \$273.37, and the judgment is too large by this amount. If the plaintiff elects to reduce the amount of the judgment by making that deduction as of the 9th of April, 1860, the judgment may stand, and it should be without costs of this appeal to either party. If not, the judgment must be reversed and a new trial ordered, with costs to abide the event.

[ONONDAGA GENERAL TERM, April 5, 1864. *Morgan, Bacon and Foster*, Justices.]

CONDERMAN *vs.* SMITH.

At law a mortgage or sale of future acquired personal property, the mortgagor neither having acquired the thing nor the agent of its production, at the time of making the contract, creates no valid subsisting property. But if the future acquired property be the product of present property in the mortgagor, as the wool growing on a flock of sheep, or the produce of a dairy, or a farm, or any thing of that character, the mortgage will take effect upon the property as soon as it comes into existence, and will be perfectly binding at law.

THIS action was commenced before a justice of the peace in the town of Fremont, in the county of Steuben. The action was tried before the justice, who rendered judgment against the plaintiff, Conderman, of no cause of action, on the 26th day of February, 1861. The plaintiff complained against the defendant, Smith, for wrongfully taking a quantity of cheese, amounting to a thousand pounds, and claimed judgment for \$80. The defendant denied each and every allegation in the complaint, and alleged that the cheese in question was sold on an execution issued by the clerk of Steuben county, by W. L. Cleveland, deputy sheriff, on a judgment rendered in favor of the defendant and one Edward T. Young, against one Samuel Sweet, and alleged that the property in question was in the possession and belonged to said Sweet. The judgment rendered by the justice was reversed by the Steuben county court, and judgment perfected in favor of the plaintiff for \$26.99, against the defendant, Smith.

On the trial before the justice a written agreement between the plaintiff, Conderman, of the first part, and Samuel Sweet and James Jones, of the second part, dated December 20, 1858, was produced and read in evidence. By this agreement Conderman leased his farm of 180 acres, with 24 cows, &c., to Sweet and Jones, for two years, with the privilege of five years from the first of March then next, for the sum of \$450 each year. Sweet took possession of said premises, or farm and cows described in the lease, and made the cheese in

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question from the cows on the premises. On the 26th day of May, 1860, Sweet and Jones, for the purpose of securing to the plaintiff certain rent then due and to become due upon the said lease, executed a chattel mortgage to him, of a wagon, harness, sleigh and other articles. The mortgage contains the following clause: "Also, all the grain growing on the lands rented aforesaid, all the corn and potatoes now planted thereon, all the hay growing on the ground on said premises, all the fruit growing on said premises, all the interest of said Sweet in and to any cows, cattle or stock on said place; also, all the interest of said Sweet in and to the butter and cheese now made or to be made during this season, on said premises." On the 19th of July, 1860, an agreement was entered into, in writing, between Samuel Sweet and the plaintiff, by which Sweet sold to the plaintiff, and for him agreed to make and manufacture into cheese, all the milk to be milked from the cows then in his possession, until the 1st day of December then next, excepting what might be necessary for butter and milk to be used in Sweet's family. And it was further understood and agreed that said cheese was to be the property of Conderman, as soon as made, and to be delivered in the cheese room of the house occupied by Sweet. In consideration of which Conderman agreed to pay and allow for said cheese the sum of seven and one half cents per pound, to be applied on the rent of the farm so leased to Jones and Sweet. Sweet also agreed to draw the cheese so made for said Conderman, to the village of Bath, and deliver the same at the grocery of one Samuel Scott, within twenty days after they were made. In consideration thereof Conderman agreed to pay Sweet one half cent per pound so drawn, and to be applied on the rent of said farm and property.

The defendant appealed from the judgment of the county court, and insisted that the chattel mortgage being upon butter and cheese to be made during the season, was void for uncertainty, and fraudulent as to creditors; and that a chat-

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tel mortgage could only operate upon property in existence at the time of its execution, and could not be given upon the future products of land.

J. B. Finch, for the appellant.

Bemis & Stevens, for the respondent.

By the Court, JOHNSON, J. Upon the principle adopted in *Van Hoozer v. Cory*, (34 Barb. 10,) the title to the cheese in question vested in the plaintiff by virtue of the mortgage, and of the contract of the 16th of July, 1860. That contract was not an agreement to sell at a future day, but an absolute unconditional present sale, for a specified price, to be applied in payment of the accrued and accruing rent. It is impossible to distinguish this case in principle from that above cited. That case, like this, was an action by the lessor and purchaser, against a creditor of the lessee who had taken and sold the products of the farm and dairy upon execution; and the court held that it did not fall within the rule which prohibits the selling or mortgaging property not in existence or not owned at the time by the vendor or mortgagor. It was the product of property which the vendor owned at the time, and was, as it is expressed in the books, potentially his and therefore the subject of sale. This is a very old and well settled doctrine, which is laid down in most of the elementary works, and is very fully and carefully examined and stated in *Van Hoozer v. Cory*, (*supra*,) where many of the authorities are cited. The same principle is fully conceded in *Otis v. Sill*, (8 Barb. 111, 112.) The case is clearly distinguishable from that of a sale or mortgage of property to which the seller or mortgagor has no right at the time of the sale or the mortgage, either actual or potential, but in which he expects he shall or may acquire some title or right at a future day. In such case the sale or mortgage is void, as all the books and cases agree. That was the case of *Otis*

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v. *Sill*, (*supra*,) and also of *Gardner v. McEwen*, (19 *N. Y. Rep.* 123,) as to that part of the mortgage held to be void.

This doctrine seems to have undergone a good deal of discussion recently in the courts in England, and it has finally been settled in the house of lords, in the case of *Holroyd v. Marshall*, (9 *Jur. N. S.* 213,) that at law a mortgage or sale of future acquired personal property, the mortgagor neither having acquired the thing nor the agent of its production at the time of making the contract, creates no valid subsisting property. But if the future acquired property be the product of present property in the mortgagor, as the wool growing on a flock of sheep, or the produce of a dairy, or a farm, or any thing of that character, the mortgage will take effect upon the property as soon as it comes into existence, and will be perfectly binding at law. (3 *Am. Law Reg. N. S.* p. 31, 32, *n.*) This is entirely in accordance with the determination in *Van Hoozer v. Cory*, and there can be no doubt, I think, that it is the true rule. The defendant's counsel relies upon the case of *Milliman v. Neher*, (20 *Barb.* 37.) But that was not the case either of an absolute sale, or of a mortgage. It was a mere contract for a lien by way of security; and was not regarded as a mortgage, or a sale, by the court, as expressly appears at page 40 of the opinion. The point discussed and apparently decided did not therefore arise in the case. This is noticed by the learned judge who delivered the opinion in *Van Hoozer v. Cory*, as distinguishing *Milliman v. Neher* from the case then under consideration. The same distinction is applicable to the present case. I think *Milliman v. Neher* was correctly decided upon the facts appearing in the case, but it is not to be regarded as deciding the question of the validity of a mortgage, or of an absolute sale of similar property, *bona fide* between parties similarly situated. The mortgage in this case would only apply to the cheese manufactured prior to the date of the contract of the 16th of July. The contract imports an absolute sale of the cheese to be manufactured thereafter, and to that extent must be regarded

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as an extinguishment of the right of redemption of the mortgagors in that property. But each having been made for a valuable consideration, is valid if made otherwise in good faith, and without any intent to hinder, delay or defraud the creditors of the vendor and mortgagor.

It does not appear upon what precise ground the justice placed his decision. If he held the sale void as of property not in being at the time, it was erroneous in point of law. And if he held that either the mortgage or the contract of the 16th July was fraudulent and void because it was not made to appear sufficiently on the part of the plaintiff that the absolute sale and the mortgage were made in good faith and without any intent to hinder, delay or defraud the creditors of the mortgagor and vendor, the judgment was properly reversed in the county court for erroneous rulings by the justice in the course of the trial. On this point two instances will suffice. The plaintiff, to excuse the absence of an immediate delivery of the property and a continued change of possession, offered to prove that there was no other cheese house in the neighborhood than the one on the premises, where the cheese could be taken to be cured or dried until it would be proper and safe to remove them. This evidence, upon objection by the defendant, was excluded. This was pertinent evidence to show a reason for the continuance of the property on the farm where the mortgagor resided, and the exclusion of it was erroneous.

It also appears by the evidence that the defendant had purchased one cheese of the mortgagor before the contract of the 16th of July, and which cheese had been manufactured and was in existence at the time the mortgage was executed. No demand had been made of it before the action was brought, and the plaintiff attempted to show that it had been consumed by the defendant or in his family, or otherwise disposed of by him. The defendant testified that it had not been consumed in his family. The plaintiff then proposed to prove by him that he had disposed of it otherwise. This was objected to

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and excluded by the justice. This was error, as the plaintiff was thus prevented from proving an actual conversion of this article of property. There is considerable evidence in the case as to whether the deputy sheriff, at the sale upon the execution, sold any thing more than the right and interest of Sweet, the tenant and mortgagor. But this is of no consequence, as it appears expressly that the defendant, who was the purchaser at such sale, had sold the cheese so purchased.

The judgment of the justice was therefore properly reversed by the county court, and the judgment of reversal must be affirmed.

[MONROE GENERAL TERM, December 7, 1863. Johnson, E. D. Smith and J. C. Smith, Justices.]

PROUTY vs. EATON and wife and others.

The defense of usury is not a counter-claim within the meaning of the code. Matter which shows that the plaintiff never had any cause of action, against the defendant, which the law would aid him in enforcing, is no counter-claim. *Per* JOHNSON, J.

Payment and discharge of a mortgage given as collateral security for the payment of a prior mortgage, operates as a payment upon the principal debt. *Prima facie* there is nothing else upon which the money paid can apply.

Although the defendants, in an action to foreclose a mortgage, fail to set up in their answer, distinctly, the defense of payment, alleging merely an accord and satisfaction, and that nothing remains due, yet if evidence showing that the debt has been paid, is received, without objection, the defendants are entitled to the benefit of such proof.

The exclusion of the testimony of a party in his own behalf, in respect to a transaction between him and a deceased person, against the executors of the latter, specified in section 899 of the code, extends only to evidence of that character when offered against a party who has acquired title to the cause of action *immediately* from such deceased person, and not where the party has acquired such title from the decedent *mediately* or remotely. In all other cases parties are competent to testify to such facts, as much as to any other. Thus where the plaintiff in a foreclosure suit, though originally the immediate assignee of the deceased mortgagee, had assigned the mortgage to other

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persons, viz. the executors of the mortgagee; *Held* that he was by that assignment wholly divested of all title; and that upon the executors re-assigning the mortgage to him, his title was then derived immediately and entirely from them, and from no other person; and he stood as though he had never had any title, other than that derived from the executors; the re-assignment not restoring him to his original condition of immediate assignee of the deceased mortgagee.

The testimony of a person employed by a mortgagee as his attorney and legal adviser at the time of taking a mortgage, in respect to the terms of the bargain between the mortgagors and the mortgagee, upon which the bond and mortgage were executed, is not liable to the objection that the bargain thus made was in the nature of a privileged communication between attorney and client.

ON or about the 8th day of November, 1838, the defendants, Charles B. Eaton and wife, executed to Phineas Prouty, senior, now deceased, a mortgage, bearing date on that day, upon certain premises, being sixty acres of land in the town of Phelps, Ontario county, N. Y., which mortgage was collateral to a bond made by the defendant Charles B. Eaton, of the same date, to said Phineas Prouty, senior, which bond and mortgage were conditioned to pay \$1700 in five years from the date thereof, with interest semi-annually.

On or about the 16th day of November, 1838, Eaton and wife executed to the said Phineas Prouty, senior, another mortgage, dated that day, upon a lot of 69 $\frac{1}{4}$ acres, and upon a lot of three acres, and upon another lot of three acres, in said town of Phelps, other land than that described in the first mentioned mortgage, which was delivered and taken as a collateral security to the first mentioned mortgage and bond, but which last mortgage was conditioned to pay \$1800 in five years from the 8th November, 1838, and interest semi-annually. Some time in the year 1840 or 1841, Phineas Prouty, sen. commenced a foreclosure of the mortgage first above described, by advertisement under the statute. The defendant Charles B. Eaton thereupon filed his bill in the court of chancery, alleging that the said mortgage was usurious and void, and obtained an injunction restraining such foreclosure. To this bill Phineas Prouty, sen. put in an answer. After the

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cause was at issue on the pleadings, and on or about the 9th of June, 1841, Prouty and Eaton met, and Eaton and wife conveyed to Phineas Prouty, sen. a lot of land in Michigan, for a consideration of \$400, and a lot of land in Phelps for a consideration of \$1000; and the said Prouty discharged of record, and acknowledged paid, the mortgage secondly above mentioned, given as collateral to the bond and the first mentioned mortgage, and no further proceedings were had in the statutory foreclosure, or in the action in the court of chancery, and nothing has since then been paid or collected on the bond and mortgage. On or about the 21st day of January, 1860, Phineas Prouty, sen. assigned the bond and mortgage first above mentioned to Phineas Prouty, jun., the plaintiff in this action. It did not appear in proof that any consideration passed from the plaintiff to Phineas Prouty, sen. therefor. On or about the 21st day of January, 1860, this action was commenced by Phineas Prouty, jun. the present plaintiff, and issue was joined therein by the service of the answer on or about the 2d day of April, 1860. On or about the 21st of February, 1862, Phineas Prouty, sen. departed this life, and the plaintiff and Alex. L. Chew and Thomas Hillhouse were appointed executors of his last will and testament, and shortly after the plaintiff assigned, by instrument in writing, and delivered the said bond and mortgage to said executors. The bond and mortgage have never been assigned or delivered back to Phineas Prouty, jun. the plaintiff in this action. The action was referred to Hon. S. G. Hadley, as sole referee, and was tried before him. The referee reported in favor of the plaintiff upon all the issues in the case, and that \$1339.49 was due to him upon the said bond and mortgage; and in his report ordered and adjudged a sale of the mortgaged premises, and directed the avails of the sale to be applied, first, to pay the plaintiff's costs and the amount found due to him, and referred it to the sheriff of Ontario county to make the sale. From the judgment entered on the report of the referee the defendants Eaton and wife appealed.

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C. J. Folger, for the appellants.

Dusinberre & McDonald, for the respondent.

By the Court, JOHNSON, J. It appears upon the face of the bond and mortgage in question that they had not been due twenty years when the action was commenced. They bear date November 8, 1838, and are payable five years from date. The debt therefore did not become due until the 8th November, 1843. This action appears to have been commenced in 1860. No presumption of payment therefore arises from lapse of time.

The defense of usury is not a counter-claim, within the meaning of the code. Such a defense asserts simply that the plaintiff's claim is void in law, and cannot be enforced, by reason of some inhering vice, which destroys it as a legal claim. It does not seek to establish another claim, counter to the plaintiff's, to apply by way of extinguishment or otherwise against it, but to show merely that the plaintiff's claim has not and never had any legal existence. I do not see that argument can make this proposition any plainer; and it seems to me that no authority can be necessary to justify it. It must be that matter which shows that the plaintiff never had any cause of action, against the defendant, which the law would aid him in enforcing, is no counter-claim.

I am entirely unable to see how the referee, upon the undisputed facts before him, could have found that the debt in question had not been paid, and deduced the legal conclusion that there was still remaining due any sum whatever thereon. The bond and mortgage in question are dated November 8, 1838, and are to secure the payment of \$1700, in five years, with interest semi-annually. On the 16th of the same month and year, the defendants executed and delivered another mortgage, to the same mortgagee, upon other

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lands, for the consideration of \$1800, which, as appears upon the face of the instrument and as found by the referee, was made and accepted and held as collateral security for the payment of the bond and mortgage. On the 9th of June, 1841, the defendants conveyed to the mortgagee two parcels of land; one in the state of Michigan for the consideration of \$400, as expressed in the deed, and the other for the consideration of \$1000. These two amounts were indorsed on the bond and mortgage in question. On the same day the mortgagee executed a satisfaction and discharge of the second mortgage, which was duly acknowledged on that day, and recorded in the office of the county clerk, where the mortgage was recorded, on the first day of November thereafter. This discharge certifies that the mortgage "is paid, satisfied and discharged." This being matter of record, is at least *prima facie* evidence that the said mortgage was satisfied by payment of the amount to the mortgagee. This might perhaps have been explained, and the real consideration for the discharge shown. But there is no evidence upon the subject, one way or the other. As it stands upon the evidence, the fact of the satisfaction and discharge of that mortgage, by payment, appears; nothing more nor less. This is in no respect negatived by the finding of any fact by the referee. All he finds upon this subject is that Prouty, the mortgagee, undertook to foreclose the first mortgage. That the defendants filed a bill in chancery to restrain the proceedings to foreclose. That issue was taken upon the allegations in the bill. That on the 9th of June, 1841, the suit was settled. That the two parcels of land were conveyed by the defendants for the sum of \$1471.48, and the amount indorsed on the bond and mortgage in question, "and thereupon the said Phineas Prouty, deceased, discharged the said collateral mortgage, by his written discharge." Thus it will be seen that the fact is not found, either that the mortgage was thus discharged in consideration of these conveyances of the land, or that

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it was discharged without further payment, in consideration of the settlement. Indeed I do not see how, without some further evidence, either of these essential facts could have been found. The fact stands simply proved that the collateral mortgage is paid. This, as matter of law, is a payment upon the principal debt. *Prima facie* there is nothing else, upon which the money paid could apply. It seems to me, therefore, as the case stands, both upon the evidence and the finding of facts, that the legal conclusion that there was still remaining due and unpaid, on the mortgage, the sum of \$1339.49, or that any sum remained due, is entirely contrary to the evidence, and wholly unsupported by it. The defendants, it is true, have not distinctly in their answer set up the defense of payment. They allege an accord and satisfaction, and that nothing remains due. But the evidence of the discharge was received without objection, and if it proved that the debt had been paid, and nothing remained due, the defendants are entitled to the benefit of such proof.

It was, clearly, no defense that the plaintiff had assigned the bond and mortgage to the executors of his deceased assignor, even if it had not been reassigned. The transfer was *pendente lite*, and in such a case the code, section 121, provides for the continuance of the action in the name of the original party.

The defendant Eaton was clearly a competent witness to prove the original transaction between himself and Phineas Prouty, deceased, which resulted in the giving of the bond and mortgage in question, unless the plaintiff is to be regarded as a party deriving title to the cause of action *immediately* from the deceased, in his lifetime. The exclusion extends only to evidence of that character when offered against a party who has acquired title to the cause of action *immediately* from such deceased person, and not when the party has acquired such title from such deceased person

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mediately or remotely. This is the plain reading and meaning of the provision. In all other cases parties are competent to testify to such facts, as much as to any other.

How then stands the plaintiff in this respect? It is certain that his title to the cause of action, which he had at the time of the trial, he derived *immediately* from the executors of Phineas Prouty, deceased, and not from Prouty himself. Originally the plaintiff was the immediate assignee of the deceased assignor. But the title thus acquired he had transferred to other persons for a valuable consideration, to wit, to the executors of such deceased assignor. Thus the title to the cause of action which the plaintiff derived immediately from the deceased, he transferred wholly to the executor. He was then wholly divested of all title. The executors thus acquired title immediately from him, and *mediately* or remotely, only, from the deceased. And so it was with the plaintiff, when it was reassigned to him by the executors, before the trial. His title to the cause of action, of which he had become wholly divested, was then derived immediately and entirely from the executors, and from no other person whatever. He was then a person or party, who had once had the title to the cause of action, derived immediately from the deceased person, but who did not then so hold it. The title he then held he derived immediately from others. Of course he then stood as though he had never had any title, other than that derived from the executors. The reassignment did not restore him to his original condition of immediate assignee of the deceased assignor. (*Hawks v. Hinchcliff*, 17 Barb. 502.) It is perfectly immaterial what object the plaintiff had in view, in making the assignment to the executors. It is clear that he transferred to them all the title he had, and at the time of the trial his only title to the cause of action was derived immediately and solely from persons other than the deceased assignor. He had voluntarily bartered away his former status, and stood then in an entirely new relation to the original

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assignor. The testimony of the defendant was, therefore, improperly excluded.

The sworn answer of Prouty, senior, in the chancery suit, was I think properly rejected. The plaintiff was an assignee for a valuable consideration. The original assignment to him was upon a valuable consideration; at least such is the presumption. It is under seal, and purports upon its face to be upon a good and valuable consideration. And the subsequent assignment to him from the executors is shown to have been upon his paying back to them what they paid him originally when they took the assignment from him. Being an assignee for a valuable consideration, the declarations of the original assignor were not competent.

The referee erred in excluding the testimony offered by the witness Woods, to prove the bargain between the mortgagors and the mortgagee, upon which the bond and mortgage in question were made. It was excluded upon the objection that the bargain thus made was in the nature of a privileged communication between attorney and client. The witness was shown to have been at the time the attorney of the mortgagee, and his legal adviser in the transaction, but not of the mortgagors. This ruling goes a decided step beyond the principle established by this court in *Whiting v. Barney*, (38 Barb. 393.) In that case the court went to the extraordinary and unprecedented length, as I then thought, of holding that a negotiation or bargain between borrower and lender, in the presence of an attorney, when both had consulted on the subject, could not be proved by the attorney, on the ground that it must be regarded as under the seal of confidence, as respects the attorney, although either party might, if living, testify to it and prove it by his own oath against the other. But, even in that case, it is conceded by the learned justice who delivered the opinion, that had the attorney been the attorney and adviser of one of the parties only, the matter would not have been privileged. That is this case. The distinction is perhaps not entirely obvious;

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but as a rule of law it is unquestionably sound. Under such circumstances there can be no pretense that it is a confidential communication between attorney and client.

The judgment must therefore be reversed and a new trial ordered, with costs to abide the event.

[MONROE GENERAL TERM, December 7, 1863. *Wells, E. D. Smith and Johnson*, Justices.]

TUTTLE vs. BUCK.

It lies with the party alleging that his property was exempt, under the provisions of the revised statutes, from sale on execution, to prove the facts affirmatively, which go to establish it.

Until it is made to appear what was the quantity and value of the necessary household furniture retained by a judgment debtor after a sale of his property upon execution, there is nothing from which any inference can be drawn as to whether the property levied on and sold was exempt, or not.

It is therefore erroneous for the judge, in an action brought by one who has purchased household furniture from a judgment debtor, against the sheriff for levying on and selling the same under execution against the vendor, to charge the jury that the evidence before them legally tends to prove that the property, when sold to the plaintiff, was exempt from levy and sale by the creditors of the vendor, and that they have the right from the evidence to find such to have been the fact; if in fact there was no proof tending to establish the exemption.

Whether or not the evidence on one side tends to establish a particular fact, is a question of law for the court; while its weight, and convincing force, are questions for the jury.

An exception will always lie to an erroneous charge or ruling as to the legal tendency of the evidence.

THIS action was brought by the plaintiff against the defendant, to recover possession of certain household furniture and a piano, which the defendant, as sheriff, had taken, by virtue of an execution against the plaintiff's father, from the possession of the plaintiff. The plaintiff was an unmarried woman and lived in her father's family, and claimed to have purchased the furniture from her father and to have paid for

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the same by transferring to him five shares of stock in the Oswego Starch Company, which had been previously given to her by him. The cause was tried at the Cayuga circuit, in January, 1863, and a verdict rendered in favor of the plaintiff. Certain exceptions were taken on the trial to the admissibility of evidence, and to the charge of the judge, which were ordered to be first heard at the general term.

Allen & Beardsley, for the plaintiff.

John T. Pingree, for the defendant.

By the Court, JOHNSON, J. None of the exceptions in the case are well taken, except the one to that portion of the charge on the subject of exempt property. On this subject the judge charged "that the evidence showed, or at least authorized the jury to find, that the property was exempt from execution when Tuttle parted with it, and if they should find that such was the case they might properly take that circumstance into account in determining the question of intent." I have examined all the evidence in the case with care, and am wholly unable to find any which tends to establish the fact that the property in question was exempt from levy and sale by the creditors of Tuttle, the vendor, at the time of the alleged transfer to the plaintiff. It does appear how much the property transferred was worth, and of what articles it consisted, and that the seller was a householder having a family for which he provided, but nothing more. For aught that appears he may have retained a sufficient amount after this sale to satisfy any claim he could make for exempt property. Certainly the law will not presume, in the absence of evidence, that he did not. It lies with the party alleging that property was thus exempt, to prove the facts affirmatively, which go to establish it. (*Griffin v. Sutherland*, 14 Barb. 456. *Carrick v. Myers*, Id. 9.) Until it is made to appear what was the quantity and value of the necessary

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household furniture retained by the vendor after this sale, there is nothing from which any inference could be drawn as to whether the property in question was exempt. And upon this subject, as has been already remarked, nothing whatever is shown. Had Tuttle, the plaintiff's vendor, brought the action against the defendant for selling this property, on the ground that it was exempt from levy and sale, upon this evidence—striking out the evidence of the sale to the plaintiff—it is quite clear that the action could not have been maintained. There could have been nothing to submit to a jury. It is claimed on the part of the plaintiff that this part of the charge was immaterial, and could not have influenced the verdict. To what extent it actually influenced the verdict cannot be known to the court. The substance and effect of this portion of the charge was that the evidence before them legally tended to prove that the property in question, when sold to the plaintiff, was exempt from levy and sale by the creditors of the vendor, and that they had the right from this evidence to find such to have been the fact. The jury could not fail to see that the presumption of fraud in the sale, as against creditors, arising from the other evidence, would be much less violent, if indeed not wholly overcome by that fact. They may, for aught we can see, have found that such was the fact. It was therefore material, and may have had great influence on the minds of the jury. Indeed it is by no means clear that the verdict did not turn wholly on this very question. Whether or not the evidence on one side tends to establish a particular fact, is a question of law for the court, while its weight and convincing force are questions for the jury. An exception will always lie to an erroneous charge or ruling as to the legal tendency of the evidence, and in this particular instance it is well taken. A new trial must therefore be ordered; costs to abide the event.

[MONROE GENERAL TERM, December 7, 1863. *Wells, J. C. Smith and Johnson*, Justices.]

LEWIS and others vs. McMILLEN and others.

Before a purchaser can set up, as a defense to an action on a note given as collateral security for an installment of the purchase money, the inability of the vendor to give a good title to a portion of the premises, he must surrender the possession of the premises. E. D. SMITH, J. dissented.

The fact that a vendor, though he has a perfect title to four-fifths of the premises contracted to be sold, has not a perfect title evidenced by a written conveyance, for one-fifth, although it may afford a reason for rescinding the contract by the purchaser, yet it can furnish no ground for his refusing all payment, without rescinding.

The purchaser will be compelled either to affirm, or to disaffirm and rescind, the contract, *in toto*. He will not be allowed to affirm so much of the contract as is advantageous to himself, and enjoy all its benefits, and disaffirm and reject that which is burdensome.

It cannot be pretended that a purchaser has rescinded the contract, so long as he holds the possession of the premises, under it. He must rescind by acts as well as words, or it is no rescission.

Where the action is not upon the contract of sale, nor between the parties to it, but upon a separate and independent promise by the purchaser and other parties, to pay the vendor the sum specified, at a particular day, before the defendants can defeat the action entirely, they must show either fraud in the transaction in which the note had its inception, or an entire want, or failure, of consideration. A partial want, or failure, of consideration cannot be alleged in bar.

Even if the vendors refuse to convey, if the contract is still executory on their part, such refusal is no bar to an action upon a separate note, given to secure one or more of the payments. The party must pay his note, and take his remedy upon the contract, to recover his damages for the breach. *Per* JOHNSON, J.

Parties signing such note as mere sureties for the purchaser, having no interest in the contract, cannot set up the breach of such contract as a defense against an action upon their promise. Their remedy is against their principal, for any sum they may be compelled to pay on the note.

Where the contract of sale in express terms makes the payment of the purchase money a condition precedent to the right of the purchaser to a conveyance, and in addition to this the purchaser gives his note for one of the payments, and procures other persons to sign it jointly with him, this puts the intention to make the note in the nature of an independent promise, or a condition precedent, beyond all doubt.

MOTION by the defendants for a new trial upon a case with exceptions, directed to be heard in the first instance at general term. The action is upon a promissory note for

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\$1000, made by McMillen as principal and Hannan and Van Ness as sureties. It has been twice tried. (*See 31 Barb. 395, S. C.*) On the second trial at the Ontario circuit, on the 10th day of November, 1862, before Mr. Justice WELLES and a jury, it was proved that on the 21st day of April, 1857, the plaintiffs, assignees of Cuyler Trask, entered into a contract with McMillen to sell to him a farm in Victor, of about ninety-six acres, at \$34.50 per acre. McMillen agreed to pay \$300 May 15, 1857, \$200 the first day of November, 1857, and \$1000 May 1, 1858, upon which payment, and his giving a bond and mortgage as hereinafter mentioned, the plaintiffs were to "convey in fee, by a good and sufficient deed," the farm to McMillen, and he was to execute a bond and mortgage to the plaintiffs for the residue of the purchase money. The payment of the money is declared by the contract "to be a condition precedent to the execution of a deed." The note in question was given at the execution of the contract, as collateral security for the payment of the \$1000 installment. McMillen, about the time of the execution of the contract, took possession of the farm; on the 15th of May, 1857, paid the \$300 installment, and on the 2d of November, 1857, paid the \$200 installment. It was offered by the defendants to prove the second defense in the answer, which sets forth the contract, and alleges that the note was made as collateral security for the payment of the installment of \$1000; that the plaintiffs procured the land to be surveyed, by which it was ascertained there were ninety-five and thirty-six one-hundredths acres; that the defendants paid the first two installments; that on the first day of May, 1858, McMillen tendered to the plaintiffs \$1200 for the principal and interest, payable that day, and offered to execute his bond and mortgage, according to the contract, and demanded of the plaintiffs a good and sufficient deed of conveyance in fee of the farm, which the plaintiffs were unable to and refused to give; that the plaintiffs had not at the making of the contract, and have not

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had since, a good and valid title in fee to the farm; and that because the plaintiffs were unable to convey, McMillen required a rescission of the contract and repayment of what he had paid, and offered to relinquish possession of the farm, but the plaintiffs refused to accede to the offer. It was further offered by the defendants to prove their third defense in the answer, which avers that McMillen has at all times been ready to perform the contract on his part, but the plaintiffs are unable to perform; that at the making of the contract the plaintiffs affirmed they had a good and valid title in fee to the premises; that McMillen entered into the contract on the faith of such affirmation; that the defendants did not discover the defects in the title until a short time before the first of May, 1858; that on that day the defendants offered to surrender to the plaintiffs the possession of the premises, and required a rescission of the contract and repayment of the sums paid, which the plaintiffs refused to do. The defendants made various other offers of proof, in substance, of tender of payment of the \$1000 installment with interest, on the first day of May, 1858; a demand of the plaintiffs of a conveyance in fee of the farm; that the plaintiffs had not, and admitted they had not, title to the premises; and that they have not at any time been able to convey the same in fee. The offers were severally objected to, the objections sustained, and exceptions taken. The ground upon which the evidence was excluded by the judge was, that by the express terms of the contract, the payment of the money for which the note was given was made a condition precedent to the execution of a deed by the plaintiffs, and that the defendant McMillen had taken and still held the possession of the premises. The jury, under the direction of the court, rendered a verdict for the plaintiffs for the amount of the note and interest.

E. G. Lapham, for the plaintiffs. I. The \$1000 to secure the payment of which the note was given, was by the terms of the contract to be paid in one year from the first day of

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May, 1857. Upon such payment being made, which "payment is hereby declared to be a *condition precedent to the execution of a deed*" by the plaintiffs, the plaintiffs have covenanted that they will sell and convey in fee by good and sufficient deed, the premises in question, to the defendant McMillen. The point presented is whether the defendants are in a situation to question the plaintiff's title, until after they have complied with such condition precedent. Conceding, for the purpose of the argument, the correctness of the cases which hold that when in such a contract money is to be paid by the purchaser on a given day, and a conveyance to be made by the vendor at the same time, the law will adjudge the covenants to be *dependent*, so that neither party can recover without performance, or an offer to perform, on his part, it will be seen, on examination, that they are cases where the contract is silent as to whether performance by one party is to precede that of the other. Such is not the present case; here the parties have expressly declared that payment of the \$1000 shall precede and not be concurrent with the execution of a conveyance. By the terms of the agreement performance by the defendant was to precede that of the plaintiffs, and the defendants who were to do the first act being in default are liable to be sued, though nothing has been done or offered by the plaintiffs. (*Morris v. Sliter*, 1 *Denio*, 59.) If there is a day fixed for the payment of money, and this comes before the *time fixed for doing the thing*, the payment becomes obligatory, and an action may be brought for the money independently of the act to be done. (2 *Parsons on Cont.* 189.) A condition precedent must be performed before the obligation becomes binding. (1 *Bouv.* 287, No. 741.) Precedent conditions must be literally performed. (4 *Kent*, 125.) When by the terms of a contract for the sale of land an installment is payable previous to the time fixed for the conveyance, a suit may be maintained for such installment, and want of title in the vendor is no bar to a recovery. (17 *Wend.* 376.)

It will be observed that in this case performance by each is

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not made a condition precedent to performance by the other, but that condition is attached to the covenant of the defendant McMillan. The case is therefore directly within the rule laid down in *Dey v. Dox*, (9 *Wend.* 129, *see page* 183,) according to which the plaintiffs may recover without showing performance on their part. According to this last case the plaintiffs' covenant to convey is dependent upon the prior payment by McMillen, but the promise by McMillen to pay is independent of performance by the plaintiff. The clause giving the plaintiffs the right to forfeit in case McMillen should fail to perform at the *time provided*, aids in the construction contended for. (See *Wells v. Smith*, 2 *Edw. Ch.* 78, 83, 84.) The vice chancellor in this last case uses this strong language: "The condition of the contract in question is clearly a *condition precedent*. No one can peruse it without perceiving that every act which the complainant has stipulated to perform is antecedent to what the defendant is to do." There is another peculiarity in the language of the contract, which farther tends to illustrate what was the intention of the parties. At and upon receiving a deed McMillen is to make and deliver a mortgage to secure the balance after the payment of the first \$1500, and then it is declared such payment is to be a condition precedent to the execution of the deed. Then the fact that such payment was secured by the note in question farther serves to show that it was a payment to be made at all events, and that McMillen relied upon his remedy and not on performance of the covenant to convey. It will be seen by reference to the report of this case when formerly before the court these distinctions were not adverted to, but the case was treated as a general contract to be performed by each party at the same time, as are all the cases cited by the defendants' counsel. As to the effect of such former decision, if inadvertently made, see 4 *Hill*, 200, and 6 *id.* 440.

II. The plaintiffs, by accepting the note of the defendants for the \$1000 installment and interest, have lost their equitable lien on the land for that portion of the purchase money,

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and are for that reason entitled to maintain this action. (*See Vail v. Foster*, 4 Comst. 312.)

III. Assuming that McMillen was ready to pay the note on receiving a good title, and that he had a right to such title, or he might rescind and recover back what he had paid, (20 John. 15,) still he could not resort to such remedy without surrendering possession at once, on default of the plaintiffs. (*Lawrence v. Dale*, 3 John. Ch. 23, 41. *Lowber v. Selden*, 11 How. Pr. 526. *More v. Smedburgh*, 8 Paige, 600.) He did not surrender, but it is admitted he has had the full possession and use ever since the agreement. His only remedy, therefore, if any, for a breach of the covenant to convey by reason of the alleged defect of title, is a remedy in damages, and this he has not sought. He cannot interpose it as a bar to the plaintiffs' action and still retain the whole benefit of the contract on his part. Again, the case comes within the principle that where the alleged breach goes only to part and not to the whole consideration, the party has his remedy in damages for a breach of such part, but cannot insist upon the same as a bar to the action. (20 Barb. 429.) The grantee being and remaining in possession under his contract, it is no defense to an action for a portion of the purchase money that the vendors have not a perfect title. (*Lamerson v. Marvin*, 8 Barb. 9.)

IV. The several offers of evidence made after the principal ruling at trial do not materially change the case or affect the verdict, and were properly refused.

T. R. Strong, for the defendants. I. The conveyance of the farm by the plaintiffs to the defendants, in fee, by a good and sufficient deed, on the 1st day of May, 1858, and the payment by McMillen of \$1000, and interest on account of the purchase money, on that day, were by the contract dependent acts, to be concurrently performed. To entitle the plaintiffs to recover that installment by action on the contract, it was necessary for them on that day to offer to McMillen a deed

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which would give him the title to the farm in fee. And to entitle McMillen to an action against the plaintiffs for a breach of their agreement to convey, it was necessary for him on that day to tender them that installment. The failure by either to perform, or do what was equivalent to it on that day, was a breach of the contract, and the party in fault could not maintain an action against the other. (*Jones v. Gardner*, 10 *John.* 266. *Johnson v. Wygant*, 11 *Wend.* 48. *Williams v. Healey*, 8 *Denio*, 363. *Grant v. Johnson*, 1 *Selden*, 247. *Lester v. Jewett*, 1 *Kern.* 453. *Opinion of this court, by Smith, J. in this case*, 31 *Barb.* 395.)

II. This is so, notwithstanding the clause of the contract declaring the payment of the money to be a condition precedent to the execution of a deed. That clause does not affect the nature of the covenants; they are still mutual conditions to be performed at the same time. 1. It means nothing more than is stated in a former part of the contract, that the conveyance is to be *upon* the payment of the money, &c., which the cases above cited show does not make the covenant to convey dependent, otherwise than as a concurrent act with payment. Each act is made dependent upon the other, but both are to be performed at the same time. The clause is part of the printed blank used in making the contract, and only declares in terms what would have been the legal effect of the previous provisions without it. Taking the whole language of the contract on the subject together, such is the evident meaning and just construction of the contract. 2. This clause in terms applies to the whole purchase money, as well that payable after the 1st of May, 1858, as what is payable at and before that time. Of course, payments to be made after the 1st of May, 1858, cannot be conditions precedent to a conveyance on that day, which proves the parties did not mean by it what the language mentioned above would import. It is to be construed in reference to other parts of the contract, which, as a whole, makes the conveyance and the payment of the \$1000 installment mutual conditions.

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III. Treating payment as a strict condition precedent to a conveyance, the only effect would be that in an action on the contract, for purchase money, the plaintiffs would not be obliged in the first instance to prove performance, or what is equivalent on their part; it would not preclude McMillen, in such an action, from proving the plaintiffs had not title and availing himself of it as a defense. And the defendants in this action may do the same thing. (*Holmes v. Holmes*, 12 Barb. 137, 144, 145. *Judson v. Wass*, 11 John. 525. *Lawrence v. Taylor*, 5 Hill, 107, 115. *Harrington v. Higgins*, 17 Wend. 376. *Sage v. Ranney*, 2 id. 532, 534. *Morange v. Morris*, 34 Barb. 311, 314, 315.)

IV. The plaintiffs, by the contract, impliedly warrant the title to the premises; and the breach of their warranty by not having title, and inability therefore to convey in fee, according to the contract at the time appointed, relieves McMillen from the obligation of payment. It is not material in respect to this position, whether payment is a condition precedent to the obligation of the plaintiffs to convey, or not; for, assuming it is so, and that the plaintiffs might maintain the action without proof of the performance on their part, want of title is a valid answer to the claim of payment. While McMillen might not be able in an action on the contract to defend on the ground that the plaintiffs had not proved they had conveyed or tendered a conveyance in fee, he might—and the defendants in this action may—show want of title in the plaintiffs, and thus defeat the action. This defense of want of title is wholly irrespective of the question whether the plaintiffs or McMillen were to perform first, or they were to perform concurrently; in either case want of title in the plaintiffs is a defense. (*Fletcher v. Button*, 4 Comst. 396. *Burwell v. Jackson*, 5 Seld. 535. *Pomeroy v. Drury*, 14 Barb. 418. *Judson v. Wass*, 11 John. 525. *Holmes v. Holmes*, 12 Barb. 137, 144, 145. *Lawrence v. Taylor*, 5 Hill, 107, 115.)

V. The note in question was executed simultaneously with the contract, and formed part of it. The effect of it was that

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Hannan and Van Ness became sureties for the payment of the \$1000 installment. The payment of that installment would have satisfied the note, and the failure of the plaintiffs and their inability to perform exonerated McMillen, and of course, his sureties, from the payment of the money. The note had no consideration independent of the contract. The contract of the sureties is collateral only to the obligation of McMillen to pay, and if McMillen is discharged, the sureties are of course discharged. (*Opinion of this court by Smith, J. in this case, 31 Barb. 395.*)

VI. The possession of McMillen does not vary the case; his obligation to pay the \$1000 and interest, is by the contract dependent upon a conveyance to him by the plaintiffs, of the farm in fee. Whether he is in or out of possession is not material; he was not bound to pay if he could not have such a conveyance. Besides, McMillen offered to surrender the possession and rescind the contract. This is all he could do. (*Grant v. Johnson, 1 Selden, 247. Fletcher v. Button, 4 Comst. 396. Opinion of this court by Smith, J. in this case, 31 Barb. 395.*)

VII. The justice at the circuit therefore erred in rejecting evidence, overruling the offers of proof and directing a verdict for the plaintiffs, for which errors a new trial should be granted.

JOHNSON, J. The learned justice before whom this cause was last tried, and whose rulings we are now called upon to review, felt constrained to adopt the same ruling substantially, which was made on the first trial of the cause in April, 1859, in order to prevent a complete failure of justice between the parties. That ruling was held to be erroneous, and a new trial was granted for that reason, by this court, at the March term, 1860. (*See 31 Barb. 395.*) The history of this case, since the first trial, seems to me to furnish a most forcible and convincing illustration of the soundness of the ruling at the circuit, and of the fallacy of the decision of the general term in

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granting a new trial. In the fruitless search of some other principle upon which even tolerable justice could be meted out to the parties, it has since that time been under repeated investigation both at the circuit and at the general term; and finally comes back to rest on the same ground on which it was then placed. In the mean time the defendant McMillen has been in the full and complete possession and enjoyment of all the benefits and advantages secured to him by the contract which formed the consideration of the note in question, uninjured and undisturbed by any adverse title, or claim of title whatever. He has retained the entire possession and enjoyment of the plaintiff's property under that contract, for a period of nearly seven years, and still retains the same, while refusing to fulfill his obligations under the same contract. If this can be done for this period, it may upon the same principle, for aught I can see, be indefinitely continued, and result in securing to McMillen the entire property for all time, without making any compensation therefor. It remains to be seen whether a principle which produces such results can be sound in law. I am confident, notwithstanding our former decision, that the principle can be shown to be unsound and untenable, not only upon the clearest dictates of reason, but upon well settled authority. If the action were directly upon the contract, and between the parties to it only, it being an executory contract on both sides, the law would not allow the purchaser to repudiate his obligation to make payment while retaining and enjoying the consideration of his promise. He could not thus both affirm and disaffirm the contract. He would not be allowed to affirm so much of the contract as was advantageous to himself, and enjoy all its benefits, and disaffirm and reject that which was burdensome. He would be compelled either to affirm, or to disaffirm and rescind, *in toto*. This must be so, especially in a case like this, where the plaintiffs have offered to perform fully on their part, according to the terms of the contract; and all the purchaser is able to say in respect to this offer is, that although the plaintiffs

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have a perfect title to four-fifths of the premises contracted to be sold, they have not a perfect title evidenced by a written conveyance for one-fifth. This, it must be conceded, if true, might furnish ground for rescinding the contract by the purchaser, but it could furnish no ground for refusing all payment, without rescinding. Unless this is so, there is no such thing as mutuality in contracts. It is idle to pretend that the purchaser here has rescinded the contract, when it is undisputed that he has held the plaintiff's property under it for six or seven years and still holds and enjoys the same. He must rescind by acts as well as words, or it is no rescission. Our decision at general term was to the effect that in such a case and under such circumstances, no payments whatever could be enforced. Thus the purchaser is enabled to keep the whole by virtue of the contract, without incurring any obligation to pay any thing. His refusal to pay, according to our decision, is no breach of the contract on his part, for the contract did not bind him to pay, unless the plaintiffs were seised of a perfect title in law to each and every acre of the land they contracted to sell and convey. And all this without requiring him to rescind and restore what he had received. This cannot be good law.

But this action is not upon the contract, nor between the parties to it. The action is upon a separate and independent promise by the purchaser and other parties, to pay the plaintiffs the sum specified at a particular day. The consideration of this promise, it is true, is the agreement of the plaintiffs with McMillen. But before the defendants can defeat the action entirely, they must show either fraud in the transaction in which the note has its inception, or an entire want, or failure, of consideration. A partial want, or failure, of consideration cannot be alleged in bar; and no fraud is shown.

It is quite manifest that here is no entire failure of consideration. The plaintiffs have not refused to convey, but offer to convey the entire premises, and insist upon their right to the whole, and this right to the largest portion by far is con-

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ceded. But, even if the plaintiffs had refused to convey, the contract being still executory on their part, the cases are abundant to show that such a refusal is no bar to an action upon a separate note, given to secure one or more of the payments. The party must pay his note, and take his remedy upon the contract, to recover his damages for the breach. In such case the payment of the note, and the conveyance, are not concurrent, but independent acts. The note is in the nature of a condition precedent, and must be paid. This was expressly ruled in *Spiller v. Westlake*, (2 B. & Ad. 155 ; 22 Eng. C. Law, 49.) In that case Lord Tenterden, C. J. says : "I can see no reason why he should have executed a distinct instrument, whereby he promised to pay a part of the purchase money on a particular day, unless it was intended that he should pay the money on that day at all events." Parke, J. was inclined to the opinion that the defense might have been maintainable, if the circumstances had been such that had the defendant paid the money he would have been entitled to recover it back in an action brought by him, which he held could not be done as long as the contract remained open. Here the contract remains still open, neither party having rescinded or attempted to rescind. To the same effect precisely are the cases of *Freeligh v. Platt*, (5 Cowen, 494 ;) *Moggridge v. Jones*, (14 East, 486 ; 3 Camp. 38, S. C.) and *Chapman v. Eddy*, (13 Vt. R. 205. 1 Pars. on Bills, 203, note z.) These are all cases arising between the parties to the contract. But here two of the parties to the note have no interest in the contract, and the case is still stronger in favor of the plaintiffs. As between the defendants, Hannan and Van Ness, and the plaintiffs, there is no privity of contract except in respect to this note. Those defendants have no interest whatever in the contract, and could maintain no action for any breach of it. They are mere sureties of McMillen, and their remedy is upon their principal, for any sum they may be compelled to pay on the note. Being mere sureties of McMillen, and having no interest in the contract, they

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cannot set up the breach of such contract as a defense against their promise. (*Gillespie v. Torrance*, 25 N. Y. Rep. 306. 2 *Parsons on Notes and Bills*, 536, 537. *Webb v. Spicer*, 13 Q. B. 886. *Salmon v. Webb*, 16 Eng. Law and Eq. 37.) But as between McMillen and the plaintiff, the contract in express terms makes the payment a condition precedent to the right of the former to a conveyance. That, I think, would be sufficient even if the action was directly upon the contract. In addition to that, however, the purchaser gave his note for the payment, and procured other persons to sign it jointly with him; and this puts the intention to make the note in the nature of an independent promise, or a condition precedent, beyond all doubt.

The contract being, as we have seen, still open and unrescinded, and the defendant McMillen being in the full enjoyment of the benefit of the consideration of the note, is in no situation to resist payment. *Parsons*, in his book on *Bills and Notes*, at page 203, notices a distinction between the failure of the consideration of a note, and the failure of a benefit resulting from it. As where one party promises another to do a certain thing, and the other gives his note to the promissor, in consideration of such promise, the latter cannot defend against the note, on the ground of a failure of the consideration, so long as he retains the promise made to him, or if it be of such a nature that the other party is permanently held upon it. Before he can defeat the note he must cancel the promise. And in *Wright v. Delafield*, (23 Barb. 498,) it was held that a purchaser of land could not keep the land and refuse to pay for it, whether the title was good or bad. That if it was bad he must elect to take it as it was, or as the vendor could make it, and pay for it, or else give it up. And that, as the purchaser did not elect to give up the land, he must pay for it according to his agreement.

This is only stating in another form a very familiar and elementary rule of law, that where one obtains a right to the possession of land, and to the use and profits thereof, by

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virtue of an agreement, he cannot while thus holding the land dispute the title of him from whom he obtained it, and refuse to perform his agreement under which he entered and continues to hold. Before he can do this he must surrender the possession and place the party in *statu quo*. In other words he must rescind *in toto*, by restoring what he received.

The learned justice who delivered the opinion in this case on a former occasion upon granting a new trial, as reported 31 *Barbour*, 395, admits that had the defendants paid the note in question, voluntarily, it could not, upon the evidence in the case, have been recovered back. This conclusion is of itself fatal, not only to the defense but to the authority of the point then decided. For it is most manifest, in a case like this, that the principle upon which payment may be lawfully refused, and that upon which the money if paid voluntarily might be recovered back, are identical, to wit, fraud or the failure of the consideration. The difficulty in the way of the defendants, in either case, is enhanced by the fact that they are not all parties to the contract.

This case is not affected in any respect by the decision in *Fletcher v. Button*, (4 *Comst.* 396.) That was an action to recover back the purchase money paid, where it was conceded that the vendor was wholly without title to any portion of the premises. No question was raised by the pleadings as to the purchaser having obtained any rights under the contract, or as to its having been rescinded or otherwise. On the contrary, it was conceded by the answer that the plaintiff was entitled to recover back the money paid, and the only claim made by the defendant was a right of set off for use and occupation, against the amount of payments made. That case is wholly unlike this, not only in its facts but in respect to the questions raised by the pleadings and litigated upon the trial. Nor is this case to be confounded with that class of cases where a note is given in consideration of a conveyance made, and the title has failed; nor with those cases where the action is directly upon the contract which the

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purchaser has rescinded on the ground that the vendor has no title.

The action here is upon a separate promise, executed in part by persons who are not parties to the contract, and which contract is still open, neither party having put an end to it, on account of the default of the other, but each retaining every thing acquired under it. How can the court say that the plaintiffs shall not have the benefit of the contract, on their side, to recover according to its terms the value of the property which the defendant McMillen obtained from them by means of it, and which he still keeps and enjoys, and holds from them only. It was in consideration of his promise that he obtained the possession of these premises, and has so long enjoyed their use, and as long as he elects to keep the consideration and the benefits resulting from it, the law must hold him to his promise, and allow the other party to enforce it. Before the court can have any right to absolve him from his promise he must do works meet for such absolution, which he has not yet done. It would be monstrous injustice, as it seems to me, in the court to drive the plaintiffs to rescind the contract and seek some other remedy outside of it, in order to wrest the property from the tenacious grasp of the purchaser. They do not wish to rescind, and indeed under the authority of our former decision might find great difficulty in doing so should they attempt it. They prefer to enforce this joint and several promise of the defendants, and to respond to McMillen alone, if he shall prefer any claim for any breach of the contract, between themselves and him. This I think they should be allowed to do. I am of opinion, therefore, that our former decision in this case was clearly erroneous and should be reversed, and that the ruling at the circuit should be sustained and a new trial denied.

WELLES, J. concurred. E. DARWIN SMITH, J. dissented.

New trial denied.

[MONROE GENERAL TERM, December 7, 1868. *Welles, E. Darwin Smith and Johnson*, Justices.]

BONESTEEL vs. FLACK and GLYNN.

A bill of sale in this form: "Mr. W. H. bought of B. S. & Brother," naming the articles purchased, and stating the price of each, signifies—especially when read in connection with the fact that the property was delivered under it—that B. S. & Brother have *sold* to H. the articles named, at the prices given.

Such an instrument—when not made and delivered as a receipt, but to show and evidence the terms of sale, by specifying the species, quantity and quality of the several articles, with the prices, and when it declares, on its face, a sale of the property—if accompanied by a delivery and acceptance of the property, becomes the evidence of the transfer of the title; and it cannot be contradicted by parol evidence that the transaction was not a *sale*, but only a *bailment*.

Where liquors are delivered by liquor merchants, to a tavern keeper, to be by him retailed, the title to the property to remain in the liquor merchants until the property is sold, the liquors are liable to seizure and sale under executions issued against the tavern keeper.

A PPEAL by the plaintiffs from a judgment of nonsuit, ordered at the circuit. The material facts appear in the opinion of the court.

Sawyer & Russell, for the appellants.

Myers & Magone, for the respondents.

By the Court, BOCKES, J. The plaintiffs claimed to recover the value of a quantity of liquors seized and sold by the defendant Glynn on execution, in favor of the defendant Flack, against one William Hubbard. No question is made in regard to the judgment or execution, nor is it pretended that the defendants were not jointly liable in the action if the liquors belonged to the plaintiffs. It was insisted on the trial, on the part of the defendants, that the proof showed the title to the property to be in Hubbard, the judgment debtor. The judge, on considering the whole case, nonsuited the plaintiff and dismissed the complaint.

The plaintiffs were liquor dealers in Troy, and delivered the property in controversy to Hubbard, a tavern keeper in

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St. Lawrence county, who at the time of its seizure was retailing it at his bar. The plaintiffs insisted that the liquors were consigned to Hubbard on commission, not on sale; and that the title was to remain in them until disposed of by Hubbard. Evidence was given tending to substantiate this position. It appeared that the liquors were delivered under a written bill of sale, without qualifying terms. Hubbard swore that "it was a regular bill of so much liquor, at so much per gallon, with no other qualification that he remembered." The plaintiffs, on the defendants' call, produced their invoice, doubtless a counterpart or copy of the bill sent to Hubbard, which, omitting dates and immaterial advertising matters, was as follows:

"MR. WILLIAM HUBBARD,

Bought of BONESTEEL, SQUIRES & BROTHER."

Then followed the list of six items, with the number of gallons and prices carried out, in the aggregate amounting to \$181.93.

By granting a nonsuit the learned judge held either that the evidence established a contract of sale in writing which could not be contradicted or varied by parol proof, or that the property was liable to seizure under execution against Hubbard, even if the sale and delivery were qualified and subject to the condition claimed by the plaintiffs.

The first question then is, whether it appears from the written bill that the title passed from the plaintiffs to Hubbard. Does the written bill establish a contract of sale? If so, then it is conclusive, for no citation of authorities is needed in support of the proposition, that parol evidence is inadmissible to contradict or vary a written instrument. The bill of sale is unambiguous, and even if it fails to state the whole contract or transaction, it clearly declares a sale. It reads "Bought of Bonesteel, Squires & Brother," naming the articles and stating the price of each. Its plain signification—especially when used in connection with the fact

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that the property was delivered under it—is that the plaintiffs had sold to Hubbard the articles named, at the prices given. This the bill of sale distinctly asserts, and this the plaintiffs proposed to contradict by parol proof; for they sought to show that there was no sale to Hubbard—only a bailment—a mere delivery to him for sale as their factor and agent. The general remark that a receipt may be explained and contradicted by parol is subject to qualification. In *Egleston v. Knickerbacker*, (6 Barb. 458,) it was held that a receipt could be explained by parol proof, when the explanation was not contradictory of it; and it was there further decided that a receipt absolute in its terms could not be shown by parol evidence to be upon condition, except on a proceeding to reform the instrument for fraud or mistake. This case was referred to and the decision approved in *Coon v. Knap*, (8 N. Y. Rep. 402,) and the rule was reiterated—it had been before well established—that in so far as a receipt partook of the nature of a contract, it fell within the rule excluding parol proof to contradict or explain it. In *Filkins v. Whyland*, (24 Barb. 379,) it was decided that a bill of sale in form like this, but executed by the vendor, specifying the price and acknowledging its receipt, was to be construed as being a receipt for the purchase money, and that parol evidence of an oral warranty was therefore admissible. This decision was affirmed in the court of appeals. (24 N. Y. Rep. 338.) In the case cited it was not proposed to contradict the instrument. The proof of a warranty was entirely consistent and in consonance with it. The case of *Filkins v. Whyland* differs, too, from the one under consideration in this. There the paper was given to evidence the receipt of the purchase money. Not so here. In this case it was not made and delivered as a receipt, but to show and evidence the terms of sale; that is, to show the different kinds of liquor; the number of gallons of each and the prices, and on its face declared a sale by the plaintiffs to Hubbard. The property was delivered and accepted under it. It was

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competent to prove by parol the delivery and acceptance under it, for such evidence in no degree conflicted with the terms of the written instrument. Where a contract rests partly in writing and partly in parol, oral proof is admissible to supply the deficiency in the writing. (25 *Wend.* 417. 3 *Hill*, 171-6. 2 *Hilton*, 184.) But in these cases the oral proof is not in contradiction and wholly destructive of the plain import and effect of the paper. Three things only are necessary to constitute a sale; a thing to be sold, a stipulated price and the consent (duly given) of the parties. It has been well stated that any words importing a bargain, whereby the owner of a chattel signified his willingness and consent to sell, and whereby another person shall signify his willingness and consent to buy *in presenti*, for a specified price, would be a sale and transfer of the right to a chattel. Here the owners signified in writing their consent to sell the property, naming the articles and prices, and the vendor accepted them at the prices given, pursuant to the bill. The writing was not delivered as a receipt, as was the case in *Filkins v. Whyland*, but was given to evidence the transaction in pursuance of which the property was delivered, and with the change of the possession of the property, became the evidence of the transfer of the title. This distinction is marked and commented on by Judge Selden in *Terry v. Wheeler*, (25 *N. Y. Rep.* 523.) He says, in substance, that when such a paper is delivered as a memorandum of a sale, (not as a receipt of payment of the purchase price,) it will be the evidence of a contract, not open to contradiction or explanation by parol.

In the case at bar the parol evidence flatly contradicts the writing, which under any aspect of the case was part and portion of the contract under which the property was delivered. The paper asserts a sale to Hubbard, without condition or qualification. It purports to transfer to and vest the title in him. In this respect it differs widely from *Herring*

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v. *Hoppock*, (15 *N. Y. Rep.* 409,) in which case the instrument declared that the title did not pass until performance of the conditions by the vendee. Here the parol proof is to the effect that there was no purchase by or sale to him—that the property was delivered to Hubbard as an agent of the plaintiffs. In this way they sought to establish a special bargain, quite inconsistent with the plain import of the paper. In my judgment the learned judge was right in holding to the paper as the evidence of the transaction under which the plaintiffs parted with the property to Hubbard.

The plaintiffs' counsel is quite correct in saying that they cannot be divested of their property without their consent. This proposition is asserted in a great number of cases; nor does it need the sanction of authority for a principle so plain and just. But it is made to appear, as we have seen, that the plaintiffs gave their consent to the transfer, as is evidenced by the written bill of sale under which the property was delivered, and which cannot be countervailed by oral proof. The case stands the same as if the parol proof, that the liquors were consigned to Hubbard to be sold for the plaintiffs, and as their property, in Hubbard's tavern by retail, was stricken out. This cannot be allowed, to contradict the written evidence of the transfer of the title to Hubbard.

I do not discover that the incompetent evidence was excluded or expunged by any order entered in the proceedings at the trial. While I think this would have been the better mode of trial, still it was probably unnecessary. It was the duty of the court to disregard the parol agreement if inconsistent with and contradictory to the writing. This was held in *Durgin v. Ireland*, (14 *N. Y. Rep.* 322.) Judge Denio says that in such case, if the parol agreement be proved, it is still the duty of the court and jury "to give effect to the writing in opposition to the verbal contract, on the ground that whatever the parties may have said, they had fixed upon

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the writing as the exponent of their views." He adds, "so although the judge erred in admitting the parol evidence, it is not necessary for him to commit the further error of giving to it a controlling effect over the writing, which still remained the only authentic evidence of the bargain." On the whole, I am satisfied that the learned judge was right in holding that the evidence showed a transfer of the title to the property, rather than a bailment.

There is another view of the case, decisively against the plaintiffs' right of action. Concede that the liquors were delivered by the plaintiffs, liquor merchants in Troy, to Hubbard, a tavern keeper in St. Lawrence county, to be by him retailed at his bar, and that the title was to remain in the plaintiffs until sold, were not the liquors liable to seizure and sale under execution against Hubbard? The case of *Ludden v. Hazen* (31 Barb. 650) seems conclusive of this question. In the case cited the gin was delivered under a written receipt, stating that it was to remain the property of the plaintiff until paid for, and to be paid for when sold, or returned when called for. In the case at bar, according to the plaintiffs' claim, the liquors were to remain the plaintiffs' property until sold, to be paid for when sold, and the plaintiffs had the right to take them away at any time. It will be seen that the contracts are precisely alike. In *Ludden v. Hazen* it was held that when the purpose for which the possession of the property is delivered to the buyer is inconsistent with the continued ownership of the claimant, the transaction will be presumed fraudulent as against purchasers and creditors. In this case it was said that in such case the form of the transaction will be deemed to be colorable and the title held to have vested absolutely in the buyer; that inasmuch as the party was to deal with the goods as his own, the title as against creditors and purchasers vested absolutely in him. Admitting, therefore, that the arrangement was such as the plaintiffs claim it to have been, the property was

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liable to be levied on and sold under execution against Hubbard.

The nonsuit was properly ordered, and the judgment entered thereon must be affirmed.

[SCHENECTADY GENERAL TERM, JANUARY 5, 1864. *Potter, Boies and James, Justices.*]

THE EAST RIVER BANK *vs.* HOYT and others.

The fact that an individual is a member of the board of directors, and of the discount board, of a bank, will not, in the absence of any special authority to act as the agent of the corporation, in a particular transaction respecting the discounting or renewal of a note, authorize him to make admissions or statements concerning such transaction, which will bind the bank. SUTHERLAND, J. dissented.

APPEAL from a judgment entered on the verdict of a jury. The action was on a promissory note, made by the defendants Anson B. and George Hoyt, dated June 22, 1861, by which the makers promised to pay to the order of Belding Hoyt \$500 three months after date. The note was subsequently indorsed to, and discounted by, the plaintiffs. The defense was usury. The defendants alleged, in their answer, that the note in suit was made and delivered by the defendants Anson B. and George Hoyt, in part payment of the amount of a certain note for \$1000 by them made, and then due, and held by said plaintiffs; that at the time of the delivery of said note in the complaint stated, the plaintiffs, as a condition of such renewal, and of such acceptance by them of said last mentioned note, in part payment of said over due note, stipulated and agreed with the said George and Anson B. Hoyt that they, said George and Anson B. Hoyt, should make their notes for the sum of \$1500, which should be discounted by the plaintiffs; and should leave on deposit with said plaintiffs the sum of \$500; and should also leave with them their

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check, drawn on said plaintiffs, and payable when the last of the said notes for \$1500 should become payable; that in accordance with said agreement said George and Anson B. Hoyt made their three certain promissory notes, in writing, one of which is the note set forth in the complaint, each for the sum of \$500, and payable, one in three months from date, and the two others in four months from date; and having obtained, as a matter of accommodation, and without any consideration being paid therefor, the indorsements of the other of the defendants, Ackerman and Jennings, to two of said notes, to wit, one for three months, and the one in the complaint set out, delivered the same to the plaintiffs, who thereupon passed to the credit of the defendants Anson B. and George Hoyt the sum of \$1500 on the books of the plaintiffs, and delivered to the defendants Anson B. and George Hoyt their over due note for \$1000; and that the plaintiffs also received from said defendants Anson B. and George Hoyt their check, drawn on the plaintiffs for \$500 and made payable when the last of said notes matured; and also received from said Anson B. and George Hoyt the sum of \$33.48 in cash, which they paid to the plaintiffs at the time of such discounting; \$5.94 of which was interest on the \$1000 note up to the time of such discounting, and also ninety-one cents costs of protest thereon, and \$7.47 of which was for interest on the three months' note, and \$9.58 of which was for interest on the note in the complaint set forth, and \$9.58 of which was for interest on the other of the four months' notes. That under said agreement the plaintiffs kept and retained out of the proceeds of said discounted notes the sum of \$500; and held and so retained the same entirely, and without the control or use of the defendants, and the defendants never had the same or any part thereof; but that the plaintiffs wilfully, corruptly and usuriously, and with the intent and design to evade the statute in such case made and provided, took and received from the defendants Anson B. and George Hoyt, and those defendants paid the plaintiffs,

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under and in pursuance of said corrupt, unlawful and usurious agreement, the sum of \$26.63 interest on said sum of \$1000 so paid to them; which was \$9.58 over and above the legal interest thereon, for the time said money was loaned to them, and was at the rate of eight per cent and over per annum for the use and loan thereof. On the trial, the defendants offered evidence of transactions between them and J. W. Jennings, one of the directors of the plaintiffs' bank, and a member of the discount board, relative to the renewal of the old note and the giving of the one in suit, by producing a letter from Mr. Jennings to the defendants written at the time of the giving of the note sued on. The plaintiffs objected to any evidence of transactions between Jennings and the defendants, on the ground that it was not admissible against the bank. The objection was overruled, and the following letter signed J. W. Jennings, addressed to Hoyt & Brother, and dated July 3, 1861, was read in evidence:

"GENTS: The only way you can manage to have the thousand dollars (now under protest) renewed, is to get another note of \$500, making in all \$1500, discounted, and leaving the balance, \$500, in bank till the \$1000 is paid, then the note of \$500 will be delivered up; you can leave your check. I conversed with the officers of the bank about the renewal, and this is the best they can do. Money is worth to them more than 7 per ct. You may make your own note for \$500 and I will have it arranged."

"P. S.—The bank (at this time) don't discount to any parties unless they have money in bank—and my own deposit is too small to ask them to do it for me."

A. B. Hoyt, one of the defendants, testified: "I called on the bank in pursuance of this letter, and saw the president of the bank; he told me that money was worth more than seven per cent. He said if I would draw my check for five hundred dollars and leave it in the bank, that three notes for five hundred dollars each would be discounted for me. Of the proceeds of these three notes I was to have a thousand

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dollars; five hundred was to be left in the bank, with my check for five hundred dollars, to take it up when it should become due. I paid thirty-three dollars interest for the use of the thousand dollars. The president required this to be done before he would let me have the discount."

The jury found a verdict in favor of the defendants, and from the judgment entered thereon the plaintiffs appealed.

Banks & Anderson, for the appellants.

B. W. Van Pelt, for the defendants.

CLERKE, J. Although Jennings was a member of the plaintiffs' corporation, and a director, his admissions or statements should not be received as evidence against them, unless such admissions or statements were made concerning some transaction in which he was their authorized agent. (3 R. S. 692, § 112, 5th ed.)

The sole question, therefore, in this case is, was Jennings the authorized agent of the plaintiffs concerning the discount of the notes in question? Because if he was not, his letter to Hoyt & Brother should not have been received at the trial. The only proof, then, to establish the usury, would be the evidence of the defendant Hoyt, which being contradicted by that of the president, Jenkins, it is possible and even probable that the jury would have credited the latter, and have found a verdict for the plaintiffs. Independently of his own assertion, contained in the letter referred to, the only evidence introduced at the trial to show that Jennings was the authorized agent of the plaintiffs concerning this transaction is, that he was a member of the board of directors and of the discount board. But the president repudiates the idea that he had any special authority in relation to this particular transaction, for he expressly says he did not communicate with Hoyt through any other person than Hoyt himself; and when we also consider that Jennings is not called by the

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defendants to explain his letter, or to show the authority upon which he undertook to act in his communication with Hoyt, I think the letter was not admissible in evidence. If we are to deem Jennings' unsupported statements, as contained in that letter, to be binding on the bank, then, of course, any arrangements which any individual director, who was also a member of the discount board, may make will be conclusive, without showing that the subject was ever brought before the board, or ever alluded to at any of its sessions, or that that which is primarily only the joint action of the board, was delegated to such individual member of it. This would not only be seriously dangerous to the interests of the bank, but would be productive of great inconvenience and disorder in the management of its affairs. The directors would not only be imperilling its liabilities, but would be continually thwarting each other, and counteracting each other's plans and arrangements. If any one can make arrangements without common consultation, any other may make arrangements positively dissimilar, and, in the very same transaction one may revoke or alter the engagements of any or all of the others.

As I can find, therefore, no authority from the proper source allowing Jennings to act concerning this particular transaction, except the mere fact that he was a member of the board of directors and of the discount board, I think his letter should not have been received at the trial.

The judgment should be reversed, and a new trial ordered; costs to abide the event.

LEONARD, J. concurred.

SUTHERLAND, J. dissented.

New trial granted.

[NEW YORK GENERAL TERM, February 1, 1864. *Leonard, Clarke and Sutherland, Justices.*]

OLYPHANT and others vs. McNAIR.

An agent, who is commissioned by his principal to purchase a certain specific amount of property, is a special agent, and can no more purchase a smaller than a larger quantity of what he is commissioned to purchase.

Thus where McN. authorized M. to purchase, for him, five hundred shares of the capital stock of a mining company, and M. purchased one hundred shares, only; *Held* that McN. was not bound to refund to M. the sum advanced.

Though there may be cases where the purchase of a smaller quantity than that ordered would be deemed valid, as an execution of the authority *pro tanto*, yet such cases can only occur where an express or implied *discretion* was committed to the agent, in the exercise of his authority.

APPEAL from a judgment ordered at the circuit, on the verdict of a jury, and from an order of the special term denying a motion for a new trial. The plaintiffs are assignees of John M. Mackay, who, at the defendant's request, advanced \$5500 in purchase of 100 shares Rockland Mining Company, for which this suit is brought. The defendant's answer was a general denial. Mackay testified that McNair authorized him, on July 3d, 1857, to engage a contract for 100 shares, deliverable in twelve months, at \$75 per share. He at once bought the shares, and informed McNair, who made no objection until 29th December, 1857, when he complained that Mackay had taken advantage of his ignorance of the stock. This is not denied by McNair, except by saying he had no recollection of any thing having been said about twelve months in his conversation with Mackay. As to the authority, he denies having requested Mackay to buy the stock, but admits having told Mackay that if the stock was as good as Mackay stated, he would be willing to take 500 shares. The judge charged the jury that there was an irreconcilable conflict of testimony, and to decide between the witnesses, regard must be had to their interests, circumstances and means. Also, that if McNair had authorized Mackay to buy 500 shares of stock and he had gone and bought only 100 shares, McNair would not be liable; to all of which the plaintiffs duly excepted.

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The jury found a verdict for the defendant, and the plaintiffs appealed from the judgment.

Barrett, Brinsmade & Barrett, for the appellants.

B. F. Mudgett, for the respondent.

By the Court, CLERKE, J. If the justice before whom this cause was tried at the circuit was correct in stating to the jury, "If McNair had authorized Mackay to buy 500 shares of stock, and he had bought only 100 shares, McNair would not be liable, for Mackay would not have carried out his directions," the verdict must be sustained. If this ruling was correct, the case would have presented a conflict of evidence as to the authority to purchase 100 shares, which would be the only question for the jury, and this decision should not be disturbed.

An agent who is commissioned by his principal to purchase a certain specific amount of property, is a special agent, and can no more purchase a smaller than a larger quantity of what he is commissioned to purchase. Five hundred shares of a certain kind of stock may be of sufficient importance to a purchaser in his calculations and hopes of profit, when one hundred shares may not be sufficient to induce him to incur any risk, and may not at all answer the purpose for which he wants it. It is like the purchase of the mulberry trees, in *Davenport v. Buckland*, (*Lalor's Sup.* 75,) where the agent purchased only five hundred instead of six hundred dollars worth of trees, which his principal had ordered. There may be cases, undoubtedly, where the purchase of a smaller quantity than that ordered would be deemed valid as an execution of the authority *pro tanto*. But such cases could only be where an express or implied discretion was committed to the agent in the exercise of his authority. No such discretion could be implied in the case before us, from the language employed by McNair, if what he said to Mackay can be regarded

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at all as an authority to purchase. He plainly considered if it was worth his while at all to speculate in the stock, it was desirable for him to have five hundred and not one hundred shares.

The judgment should be affirmed with costs.

[NEW YORK GENERAL TERM, February 1, 1864. *Leonard, Clarke and Sutherland, Justices.*]

THE CENTRAL PARK FIRE INSURANCE COMPANY *vs.* CALLAGHAN and others.

Any improper condition imposed by one of the projectors of a company, before its organization, in respect to a loan to be made by it, will not invalidate the transaction consummated after the company is organized; unless the company has adopted and ratified the act of its agent.

APPEAL from a judgment entered at special term. The action was brought to foreclose a mortgage given by the defendant Callaghan to the plaintiffs for \$16,000, dated July 10, 1860. The defense was that the plaintiffs had exacted a subscription to their stock, as a condition of the loan, and it was therefore usurious. The facts were, that in June, 1860, A. Michelbacher, who was subsequently president, was, with others, engaged in organizing the plaintiffs' company with a capital stock of \$150,000, receiving subscriptions to the stock, and applications for loans of the capital on real estate. Callaghan made an application for a loan of \$16,000, which was approved by a committee of the associates, June 25, 1860. About the same time he subscribed for ten shares (\$1000) of the stock, and paid for it by his check, dated July 6th, which was delivered to the persons organizing the company, the 11th of July, 1860. On the 14th July, 1860, the organization of the plaintiffs as a corporation was completed, and the defendant received the whole

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amount of \$16,000 on executing the mortgage in suit, which was delivered July 21, 1860. The defendant's evidence that a subscription to the stock was exacted as a condition of the loan, was contradicted by that of the plaintiffs. The court found that the defendant's broker at the time of the application for the loan suggested that the defendant would subscribe for some of the stock, and that the defendant, to facilitate the organization of the company, did so subscribe for ten shares. The judge further found and decided as matter of law, that the transaction was not usurious, and that the plaintiff was entitled to have judgment for the foreclosure and sale of the mortgaged premises, as prayed for in the complaint, and ordered judgment accordingly.

P. Callaghan, for the appellant.

S. P. Nash, for the respondent.

By the Court, CLERKE, J. I cannot conceive how the conduct of Michelbacher, before the company was organized, could in any manner implicate them after their organization, unless they, in their corporate capacity, in the usual way, adopted and ratified his conduct. The loan was made after the organization, and the whole sum for which the mortgage was given was paid to the defendant. I fully agree with the plaintiff's counsel that any improper condition imposed by one of the projectors of the company, before its organization, could not invalidate the transaction.

None of the exceptions of the defendant's counsel are well taken.

The judgment should be affirmed, with costs.

[NEW YORK GENERAL TERM, February 1, 1864. *Leonard, Clarke and Southward*, Justices.]

* POPPENHUSEN *vs.* SEELEY and others.

An undertaking given on appeal to the general term, on demurrer, was conditioned that the appellants would pay all costs and damages which might be awarded against them on said appeal, not exceeding \$250, and also the judgment appealed from, *if the same should be affirmed*. Held, that there was no liability on the part of the sureties, until there was an absolute affirmation of the judgment.

The respondent must have the right to enter and collect a *judgment of affirmance*, before he can proceed against the sureties in such an undertaking. SUTHERLAND, J. dissented.

A mere order of the general term, affirming the judgment appealed from, except that the appellants have leave to answer the complaint, is not sufficient to authorize a recovery upon the undertaking.

THIS action was brought against the sureties on an undertaking given on appeal to the general term of this court from a judgment rendered at special term, in favor of the plaintiff, on the ground of the frivolousness of the demurrer to the complaint. The undertaking was in conformity with the provisions of sections 334 and 335 of the code; and by its terms the sureties undertook that the appellants would pay all costs and damages which might be awarded against them on said appeal, not exceeding \$250, and also the judgment appealed from, *if the same should be affirmed*. On the hearing of said appeal, the general term made an order "That the said judgment of August 13, 1860, be, and the same is hereby *affirmed*, except that the defendants have leave to answer the complaint in this action within twenty days after service upon them of a copy of this order; the costs of said appeal shall abide the event of this action." After said order of the general term, the defendants in that action put in an answer, and upon a trial of the issues, the plaintiff recovered a judgment, from which an appeal was taken to the general term, which affirmed that judgment, May 19, 1862. On the 19th day of May, 1862, the costs of the plaintiff on the appeal from the judgment of August 13, 1860, were adjusted at \$111.04. Upon the trial of the present action, at the circuit, before his honor Justice LEONARD, the

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counsel of the defendant insisted that the permission to answer, contained in the order of the general term affirming the judgment of August 13, 1860, made the affirmance *conditional*, and operated like a *reversal* of the judgment appealed from, so as to discharge the sureties from liability on their undertaking. The justice dismissed the complaint, and the plaintiff appealed.

H. Andrews, for the appellant.

A. C. Bradley, for the respondent.

LEONARD, P. J. Although there was an *order* of the general term affirming the judgment of August 13, 1860, no *judgment* of affirmance could be entered, if the defendants in that judgment availed themselves of the leave to answer contained in and forming a part of the said order. When those defendants answered, a new issue, differing in its character and mode of trial from that upon which the prior judgment had been entered, was formed, and the right to enter a judgment of affirmance, or to issue an execution on any judgment of affirmance, was forever gone. The plaintiff must have the right to enter and collect a *judgment of affirmance*, before he can proceed against the sureties in such an undertaking as the present. The plaintiff has never acquired such a right.

There never has been a final determination of the appeal from the judgment of August 13, affirming the judgment upon the issue joined. There was no liability of the defendants under their undertaking, until the condition of an absolute affirmance was accomplished. The liability of the defendants as sureties could not be retained to abide the determination of a new and different issue, arising upon an answer to the complaint, involving an investigation of questions of fact. The defendants were to be liable only upon an absolute affirmance of a judgment rendered upon issues of law, arising on demurrer to the complaint. Their undertaking does not embrace a judgment upon any other issues. Whatever right the

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plaintiff may have to issue execution, or to proceed to the collection of the judgment of August 13, 1860, as against the defendants therein, it does not extend to the sureties in the undertaking upon appeal. The sureties are entitled to the protection of a strict construction in their favor of the contract whereby they have agreed to become bound. It would enlarge their liability to hold them liable for the result which ensued after a new and different issue had been made in the action.

The result of the trial on the issues of fact finally joined in that action had no connection with the affirmance of a judgment rendered upon demurrer; and that was the condition upon which, only, the defendants were to become bound by the terms of the undertaking.

The judgment should be affirmed, with costs.

CLERKE, J. concurred.

SUTHERLAND, J. (dissenting.) In my opinion the plaintiff showed at the circuit a right to recover in this action against the defendants, the sureties to the undertaking, the amount of the judgment of August 13, 1860, with interest. The words of the undertaking are, that they "will pay all costs and damages which may be awarded against them (the appellants) on said appeal, not exceeding \$250, and do also undertake that if the judgment so appealed from, or any part thereof, be *affirmed*, the said appellants will pay the amount directed to be paid by the said judgment, or the part of such amount as to which the judgment shall be affirmed," &c.

It is impossible to say that the judgment of the 13th of August, 1860, so appealed from, was not *affirmed*, absolutely affirmed, by the general term. In my opinion it is a misapplication of words to say that the leave given by the order of affirmance, for the defendants to answer in twenty days, qualified the *affirmance*, or made it conditional. The judgment of the special term on the demurrer was absolutely affirmed by the general term, but the general term gave the

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defendants leave to answer; and that is all there really is of the general term order of affirmance. In drawing the general term order, the word *except* was inadvertently and inappropriately used instead of the word *but*, and thus came the doubt about the construction of the order. The leave to answer cannot properly be said to be an exception to, or qualification of the affirmance of the judgment of the special term.

No doubt the leave given to answer, by the order of affirmance, was in effect a stay of all proceedings on the judgment affirmed till the time to answer expired, and if an answer was put in, till the trial and determination of the issues; and upon the second judgment being obtained, the plaintiff in the judgments had no right to collect both judgments; he was not entitled to double satisfaction; and probably the defendants in this action, the sureties in the undertaking, upon showing that the amount of the judgment of August 13, 1860, affirmed by the general term, could probably be collected by execution issued on either of the judgments, could have obtained an order staying all proceedings in this action on the undertaking, till such an effort had been made, to collect of their principals. But as no such stay had been obtained, and this action came on for trial on the naked issues between the parties, it appears to me that it is impossible to say that the plaintiff had not a technical right to recover the amount of the judgment of August 13, 1860, so affirmed by the general term.

In my opinion he was not entitled to recover the costs of the plaintiff in the judgment *on the appeal*, adjusted it seems at \$111.04, because no costs were awarded against the appellants by the general term on the "*said appeal*;" but by the general term order, the costs of the appeal were to *abide the event of the action*.

The judgment should be reversed, with costs to abide the event of the action.

Judgment affirmed.

[NEW YORK GENERAL TERM, May 2, 1864. *Leonard, Clarke and Sutherland, Justices.*]

KOOP and GRAEPFEL *vs.* HANDY and others.

Upon a sale of goods through a broker, the following sale note was signed by the broker: "Sold Mr. G. H. K. for account of Messrs. H. & E. about twenty tons *divi divi*, at \$45 cash per ton, to be put in bags and delivered as soon as possible." *Held* that the instrument was not so far complete as a contract, on its face, as to exclude parol evidence of a warranty.

A well established exception to the general doctrine which regards all anterior and contemporaneous stipulations and representations as merged in the written contract, exists where one party sues another, alleging as the *gravamen* some fraud of the latter, by which the former was induced to enter into the contract.

Where the *gravamen* of the complaint was fraud upon the sale of goods, by sample, through a broker; *Held* that parol evidence of the statements of the vendors to the broker, previous to the sale, respecting the quality of the bulk of the article as compared with the sample, was admissible; notwithstanding there was a memorandum of the sale, in writing, signed by the broker, which was silent as to the quality of the article sold.

THIS was an action upon a warranty, charging that the defendants sold and delivered to the plaintiffs a quantity of *divi divi* by sample, representing it to be "of as good quality as the sample," and further representing that the "defendants warranted it so to be," and averring "that the plaintiffs, believing such representations to be true, and relying upon the warranty of said defendants, purchased," &c.; and alleging that the article was in fact "of an almost worthless quality," and claiming the sum of \$800 as damages. Upon the trial the plaintiffs called John L. Kahl, the broker through whom the purchase was made, and proved, and read in evidence, a written contract of sale, in the words and figures following:

"*New York*, 'Dec. 30, 1859.

Sold Mr. G. H. Koop,

For account of Messrs. Handy & Everett, abt. 20 tons *divi divi*, at \$45 cash per ton, to be put in bags and delivered as soon as possible.

JOHN L. KAHL, broker,
78 Pine st. near Pearl."

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The plaintiffs' counsel then offered to prove by the witness : 1st. That the contract of sale was not all in writing ; that the sale was a sale by sample ; that by the contract of sale the defendants warranted the bulk of the *divi divi* to be equal to the sample shown plaintiffs ; that the sample shown was a sound and marketable article, while the bulk of the *divi divi* was unsound and unmarketable. 2d. That the defendants, when they made this warranty to the plaintiffs, knew that it was false, and knew that the bulk of the *divi divi* was damaged, and that the sample shown was not a fair sample thereof ; and that to carry out their fraudulent representations and prevent their detection, on delivering the *divi divi* to the plaintiffs, the defendants stowed it in bags with sound *divi divi* on the outside, and unsound *divi divi* in the centre of the bags. Whereupon the defendants objected to any parol proof of the alleged warranty. The court sustained the objection, and the plaintiffs excepted. The defendants then asked leave to amend the complaint by charging fraud. The defendants objected to such amendment. The court sustained the objection, and the plaintiffs excepted. The court dismissed the complaint. Judgment was thereupon entered up against the plaintiffs for the costs of the action, and from this judgment the plaintiffs appealed.

M. V. B. Wilcoxson, for the appellants. I. The plaintiffs offered and were prepared to prove, under the issue raised by the pleadings as to a warranty of the goods, that at the time of the sale of this *divi divi*, it was stowed in bulk in the hold of a ship afloat in the harbor of New York, where it could not be inspected, and that, under these circumstances, the defendants represented and warranted to the broker, who effected the sale to the plaintiffs, that the bulk of such *divi divi* then on ship board corresponded in quality with the sample exhibited at their office. They further offered to prove that, by the general and uniform usage of the trade, merchants and brokers dealing in the article always bought and sold it

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by sample, and that the bought and sold notes of the article never contained a statement that the sale was by sample, although the sales were uniformly so made in fact. Evidence of this usage as to the manner of making the sold note was admissible, in order to a just construction of the sold note upon its terms, connected with the subject matter and the parties concerned in the transaction, and the justice erred in refusing to receive it as explanatory of the contract. (*Boorman v. Jenkins*, 12 Wend. 574.)

II. But the pleadings in the case distinctly put in issue the question of fraud and concealment on the part of the defendants in the sale of the *divi divi*. The evidence offered was clearly admissible under this issue. We offered to show that the defendants, during the negotiation for the sale of the *divi divi*, warranted the bulk to be equal to the sample, and concealed the fact that it was not so, with a knowledge at the time of their concealment of the falsity of their warranty. This was a fraud, and gave us a right of action for damages. (1 *Parsons on Contracts*, 463. *Moses v. Mead*, 1 Denio, 385. *Gallagher v. Waring*, 9 Wend. 27.)

III. The learned justice below misconceived the character of the pleadings in holding that they did not raise an issue as to fraudulent misrepresentation and concealment. 1. The whole complaint, taking its statements that the *divi divi* was sold by the defendants to the plaintiffs by the exhibition of a sound sample, with a representation on the part of the defendants to the plaintiffs that the bulk of it was of as good quality as the sample shown, in connection with its statement that the bulk of the *divi divi* delivered was nearly worthless, and not equal to the sample shown, and that the defendants concealed the bad quality of the bulk of it on delivery by their artful manner of packing it, *thereby intending to prevent the detection of its damaged state*, and that, in consequence of the premises, the plaintiffs were damaged to the amount of \$800, amounts to the statement of a cause of action for fraudulent representation and concealment. 2. The

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code permits a party to join in his complaint a cause of action for a breach of warranty with a cause of action for fraudulent representation or concealment, where both causes of action arise out of the same transaction, as was the case here. (*Code*, § 166, *sub. 1.*) 3. If both causes of action could not be united, then the plaintiffs had a right, the defendants not having demurred for uniting improper causes of action, to proceed on the trial for fraudulent misrepresentation and concealment, or for breach of warranty, as they might elect, and the court below erred in refusing to permit them to do so. 4. The answer of the defendants shows that they regarded the action as founded in fraud. They deny the fraudulent acts of concealment charged in the complaint, "*and this defendant denies all fraud charged in said complaint.*" Defendants say they sold said *divi divi* in good faith, and without any fraud, deceit or fraudulent representation, respecting the same."

J. T. Williams, for the respondents. I. The broker's memorandum, or note of sale, contained the whole contract, and it was not competent to vary or extend its terms by parol evidence. 1. The bought and sold note of the broker "constitutes the bargain and is the proper evidence of it." (*Smith's Merc. Law, Amer. ed.* 588, and cases cited in the note.) In *Peltier v. Collins*, (3 *Wend.* 459,) the court, Marcy, J. page 466, say: "The object of the memorandum is not merely to prove that there was a bargain, but to show what the bargain was." In *Suydam v. Clark*, (2 *Sandf.* 133,) the court say: "The broker is the agent of both parties, and the notes which he delivers to the parties evidence their contract." In *Allan v. Augira*, (5 *Leg. Obs.* 380,) the court say: "The broker's memorandum delivered to the parties is the best evidence of the contract." 2. The contract containing no warranty, none can be proven by parol. In *Bayard v. Malcolm*, (1 *John.* 460,) the court, Thompson, J. say: "All previous representations must be considered as conversations leading to a con-

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tract, to be consummated by the bill of sale, and as coming within the rule adopted by the court in the case of *Vandervoort v. Smith*, (2 *Caines' Rep.* 161,) and the case of *Mumford v. McPherson*, decided at this term—that when an agreement is reduced to writing, all previous treaties are resolved into that.” And again, in the same case, (p. 466, 7,) Kent, J. says: “Nor could any parol warranty have been shown, for the contract, being reduced to writing, excludes all anterior verbal negotiations and promises, as being resolved into the writing, which is the consummation and only evidence of the agreement of the parties.” Lord Abinger says, (4 *Mees. & Wels.* 144,) “If there has been a parol agreement, which is afterwards reduced by the parties to writing, that writing alone must be looked to to ascertain the terms of the contract.” In *Reed v. Wood*, (9 *Verm. Rep.* 285,) the court say: “Where on a sale of articles of personal property, a sale note is given describing the property sold, and receipting the price, but containing no warranty, the purchaser cannot give parol evidence to prove a warranty.” (See also *Van Ostrand v. Reed*, 1 *Wend.* 424, particularly the language of the chief justice, on p. 432; *Niles v. Culver*, 8 *Barb.* 205; *Randall v. Reed*, 1 *Curtis' R.* 90; *Harnor v. Groves*, 80 *Eng. Com. L. Rep.* 667, especially remarks of *Maule, J.* on p. 673; *Willard's Eq. Jur.* 73, 286.) 3. The doctrine that the sale of packed cotton is an exception to the rule now contended for—based, first, upon proof of a universal custom of selling it by sample, as in the case of *The Oneida Manufacturing Society v. Lawrence*, (4 *Cowen*, 440, 444,) and the case of *Boorman v. Jenkins*, (12 *Wend.* 566, 575,) and afterwards, in the case of *Waring v. Mason*, (18 *id.* 425,) in the supreme court, (see note, foot of p. 426,) based upon the theory “that a sale of cotton in bales, not open to the inspection of the purchaser, raises an implied warranty that the article is merchantable and free from damage”—is expressly repudiated by the court of errors in the last named case, (see prevailing opinion of the court, by the

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chancellor, p. 433,) where the doctrine here contended for, by the defendant, is impliedly recognized even in the case of packed cotton. The chancellor (p. 435) says: "The objection that the memorandum made by a broker in his books makes no mention of its being a sale by sample, is not well taken. That memorandum was not signed by the broker, so as to make it binding on either party as a written agreement, even if he could be considered as the agent of both parties in making the sale; and a bought or sold note was not given by him to either of the parties. The entry was, therefore, a mere private memorandum of the broker, which was not binding on any one as a written agreement."

II. The motion for leave to amend was properly denied. Such an amendment would change the nature of the action, and could not be made on the trial at circuit. The action was upon a *contract* of warranty, which was in fact, as appeared upon the trial, a written contract. The motion was to change it into an action sounding in *tort*—an action which, in its very nature, excludes the idea of contract—as fraud vitiates, wipes out and annihilates all contract. To maintain an action, such as was sought to be instituted by the amendment asked for, a case must be made out, such as would have justified a repudiation of the contract of sale, and permitted the plaintiffs to return the property and bring an action for the price paid for it; or, if payment had been made by the delivery of personal property, an action of replevin for such property.

The action set forth in the complaint was of a nature totally distinct from that sought to be set up by amendment. The one touches the character of the defendant for honesty and integrity, the other simply asks the fulfillment of a contract, which might have been omitted to be fulfilled solely from poverty, and therefore does not even touch the honor of the party. To defend against the one might be to a party a matter of indifference. To defend against the other might be to him a matter of great moment.

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By the Court, CLERKE, J. I. For the present, let us assume that this is an action for the breach of a contract of warranty. The instrument, upon which it is founded, is in the following words :

New York, Dec. 30, 1859.

Sold Mr. G. H. Koop, for account of Messrs. Handy & Everett, about 20 tons *divi divi*, at \$45 cash per ton, to be put in bags and delivered as soon as possible.

JOHN L. KAHL, broker,
78 Pine street, near Pearl.

The counsel for the plaintiffs called the broker, Mr. Kahl, as a witness at the trial. He testified, that he went to the office of the defendants in Burling slip, got from them a sample of this *divi divi*, (an article of commerce of which, by the way, I have never before heard,) ascertained their price for it, carried the sample to the plaintiffs, at their office in Cedar street, and thereupon executed, in his office in Pine street, a sale note, of which the above is a copy, gave a copy of it at once to the defendants, and a day or two afterwards gave the original to the plaintiffs. The plaintiffs' counsel then asked the witness whether the defendants, at the time he procured the sample from them, said any thing in relation to the quality of the bulk of it, as compared with the sample. The defendants' counsel objected to the question, on the ground that the sale note being in writing, no parol evidence in relation to the sale could be received. The court sustained the objection, and the plaintiffs' counsel duly excepted.

It is scarcely necessary to state the well known rule, that, where a written contract appears on its face to be complete, you can no more add to or contradict its legal effect by parol stipulations, preceding or accompanying its execution, than you can alter it through the same means in any other respect. The instrument must, however, have completeness on its face; and, as a general rule, every instrument is presumed to be complete. But, in order to exempt a case from the

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operation of the rule, it is not necessary that the writing should expressly and directly rebut the presumption of completeness. In *Jefferey v. Walton*, (1 Stark. 267,) referred to by Mr. Phillipps in his Evidence, and by Judge Cowen in his Notes to this work, an action was brought for not taking proper care of a horse which the defendant had hired of the plaintiff. At the time of the hiring the following memorandum was made: "Six weeks at two guineas. William Walton, jun." Lord Ellenborough treated it as a contract incomplete on its face. In admitting evidence that the defendant, at the time of hiring, agreed by parol to be responsible for all accidents, he said: "The written agreement merely regulates the time of hiring, and the rate of payment, and I shall not allow any evidence to be given by the plaintiff in contradiction of these terms; but I am of opinion that it is competent for the plaintiff to give in evidence supplementary matter as part of the agreement." Bills of parcels have been held to fall within the range of the exception. In *Harris v. Johnson*, (3 Cranch, 311,) it was held that a bill of parcels, or sale note, delivered by the vendor, stating the goods as bought of the vendee and another, is not conclusive evidence against the vendor that the goods were joint property; but the real circumstances may be explained by parol. There are many similar cases. The most recent in our own courts is that of *Filkins v. Whyland*, (24 N. Y. Rep. 338.) The instrument was in the following words:

"C. B. Filkins bought of C. Whyland one horse, \$150.
Rec'd payment. C. WHYLAND."

It was held that this did not exclude parol evidence of a warranty of soundness. It was held that it was a mere acknowledgment of payment, and was not meant by the parties to be a written contract. The court were of the opinion that, to justify the exclusion of parol evidence, the contract must be a formal one, and that it must appear,

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from the face of the instrument, that the parties intended to consummate the agreement by writing.

The instrument, in the case before us, would be very nearly similar to that in *Filkins v. Whyland*, if it had a receipt appended to it. It is, evidently, a mere note or memorandum of the sale, signed by the broker, without any indication that it should contain all the terms necessary to satisfy either party, or to consummate their intentions in a transaction of this nature. It is silent as to the place of delivery, and as to the place where the article was then situated. It is in every respect as informal as the memorandum in *Filkins v. Whyland*; and I can scarcely think that the mere absence of a receipt, appended to it, makes it more formal or more complete than the memorandum in the case to which I have referred. Suppose, for instance, that the broker in this case, after he signed his name to this note of sale, signed a receipt subjoined to the note or on the other side of the paper, would it, in effect, be at all different? Would the receipt detract from the formality of the instrument? I am disposed to think none of these *memoranda* of sales, whether receipts are or are not appended to them, are ever intended by the parties to be complete contracts. They all alike want that formality without which it cannot be supposed that the parties exercised that forethought and circumspection which they no doubt would have exercised, if the instrument was any thing more than a mere note, memorandum, or entry.

I am aware that *Harnor v. Groves* (6 J. Scott, 667 ; 80 Eng. Com. Law Rep. 667) is strongly opposed to this view. The instrument, in that case, was a mere memorandum or note ; and all the judges held that the parties were bound by the written note, and that the purchasers could not be allowed to prove, by parol evidence, that the article sold was warranted. The only difference between that and the case under consideration is, that in the one, the note of sale was signed by the vendor himself ; in the other, it was signed by a broker, who casually undertook to intervene between the

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parties. This difference may not be essential, although, I think, in taking into consideration the question of formality and completeness, that it is not without weight. At all events, if *Filkins v. Whyland* is sufficiently in point, it, of course, controls our decision.

II. Even, however, if this memorandum should be deemed a complete contract, I am inclined to think that the plaintiff was entitled to prove fraud on the part of the defendants in this transaction. I do not deem this an action *ex contractu*, but an action *ex delicto*. A well established exception to the general doctrine, which regards all anterior and contemporaneous stipulations and representations as merged in the written contract, exists where one party sues another, alleging as the *gravamen* of his action some fraud of the latter, by which the former was induced to enter into the contract. The pleadings in this case sufficiently, though not formally, put in issue the question of fraud and concealment on the part of the defendants, in the sale of the *divi divi*. The complaint states that the defendants represented to the plaintiffs that their said *divi divi* was of as good a quality as the sample shown to them; that the plaintiffs believed such representations to be true, and, relying upon these representations, made the purchase; that the bags containing the same were nearly filled with damaged *divi divi*, which was almost worthless, and which inferior and worthless article was covered on the top and sides with *divi divi* of the kind and quality represented to the plaintiffs; the defendants thereby intending to prevent the detection of said damaged *divi divi*. The *gravamen* of the complaint then seems, or may, without violence to the language, be deemed to be fraud. It is not necessary, at all events, under our present system, to allege fraud in set and technical terms.

The defendants in their answer assume the allegation of fraud in the complaint; and, in express and positive terms, traverse it, clearly making fraud the issue to be tried. On this ground, therefore, if not upon the ground which I have

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first presented, I feel greater confidence in thinking that this judgment should be reversed, and a new trial ordered ; costs to abide the event.

It may be well to notice a point taken by the counsel of the plaintiffs, in which he insisted that the law, in the sale of commodities like *divi divi*, will raise an implied warranty. He insisted, even if this memorandum could be considered a complete contract, that according to *Boorman and Johnston v. Jenkins*, (12 *Wend.* 574,) and *Waring v. Mason*, (18 *id.* 425,) the law implies a warranty, as in a sale, by sample, of cotton. If these cases take the sale of cotton by sample out of the general rule of the common law, so as to create an implied warranty, it must be, as the chancellor says in the latter case, upon the ground that it is impossible, in the customary mode of examining and selling cotton in the bale in this country, for the purchaser to ascertain the defect, and that it is not within the principle of the common law rule of "*caveat emptor*." We would not be justified, I think, even if there was a more positive and stronger current of authority in favor of cotton, to extend the exception to the article sold to the plaintiffs in this case. Neither was there any proof, or any offer to prove that it was impossible, or extremely difficult, for the purchaser to examine the article, from the manner in which it was packed or situated, in order to ascertain its condition. On the contrary, the defendants allege in their answer that the *divi divi* lay in the hold of a vessel called the *Alna*, at the port of New York, open to the inspection of all, and where the same could easily have been examined. There was no offer, on the part of the plaintiff, to rebut this allegation.

I repeat, however, for the reasons which I have above stated, that the judgment should be reversed, and a new trial ordered ; costs to abide the event.

[NEW YORK GENERAL TERM, May 2, 1864. *Clerke, Sutherland and J. R. Barnard*, Justices.]

KITCHEN and others *vs.* PLACE.

Where a blank space is left, in a promissory note, after the word "at," in the place where the place of payment is usually mentioned, the holder of the note is authorized, by an implied authority, to fill the blank.

The word "at" implies that the blank space which succeeds it may be filled before the note is delivered, with a designated place of payment. And if the holder fills in a place of payment, it will not discharge the indorser.

A PPEAL from a judgment ordered at the circuit, on a trial before the court without a jury. The judge found that on and prior to the 10th day of July, 1862, the plaintiffs were the owners and holders of a promissory note for \$122.41, payable on that day at the Importers and Traders' Bank, New York, made by Henry C. Place, payable to the order of and indorsed by the defendant, who was an accommodation indorser for the benefit of said Henry C. Place. That shortly before the said 10th day of July, the said Henry C. Place, for the purpose of procuring a renewal and extension of the time of payment of a portion of said note, made a new note, using a printed blank for that purpose, of which note the following is a copy:

"\$100.

New York, July 10, 1862.

Two months after date, I promise to pay to the order of N. Place, one hundred dollars,

Value received.

(Signed) H. C. PLACE."

And sent the same to and procured it to be indorsed by his father, the defendant in this action. And on or about the 9th day of July, 1862, the said Henry C. Place sent said note in a letter to the plaintiffs to take up the original note, and a check for the balance thereof; and in said letter the said Henry C. Place stated that he had forgotten the name of the bank in which his note was payable, and requested the plaintiffs to insert the same in the new note, and inform him by bearer.

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The plaintiffs on the receipt of the new note inserted therein the words "Importers and Traders' Bank," in a blank space which was left in the note between the word "at" and the words "for value received," all of which were in the printed part of said note. And the plaintiffs immediately wrote to Henry C. Place stating that his note coming due the 10th July was payable at the "Importers and Traders' Bank," and they had filled up the blank in this note with the same place; that the note coming due on the 20th was in the bank, and saying they would send for it the same day and requesting said Henry C. Place to call for it the next day, when it would be ready; but the same was not called for, and the plaintiffs produced and offered to cancel it on trial. That in consequence of such renewal of said original note as aforesaid, the plaintiffs omitted to have the same protested. That the said note bearing date July 10, 1862, was on the 13th day of September, 1862, duly presented at said Importers and Traders' Bank for payment, and payment thereof demanded and refused, and the same was then protested for non-payment pursuant to such demand, and due notice thereof given to the defendant. That no part of said last mentioned note has been paid, and that said note and interest and notary's fees for protesting the same, amounts to the sum of \$102.75. He therefore found and decided as a conclusion of law, that the plaintiffs were entitled to recover of the defendant the sum of \$102.75, besides costs.

E. L. Sanderson, for the appellant.

E. S. Capron, for the respondents.

By the Court, LEONARD, J. The defendant indorsed the note, leaving a blank in the body of it after a word which would be unmeaning unless the blank were filled. The word "at" implied that the blank space which succeeded it might be filled before the note should be delivered, with a desig-

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nated place of payment. Had that word been erased, the sense would have been complete without filling the blank. With this isolated word, the note was imperfect in its purport, until the space was filled or the word erased.

In such instances it has been held that the holder of the note is authorized, by an implied authority, to fill the blank. (*Mitchell v. Culver*, 7 Cowen, 336. *Boyd v. Brotherson*, 10 Wend. 93. *Bruce v. Westcott*, 3 Barb. S. C. R. 377. *Cruchley v. Clarence*, 2 Maule & Sel. 90. *Van Duzer v. Howe*, 21 N. Y. Rep. 531, 536.) The opinion in the case of *Van Duzer v. Howe* confirms the authority of the cases cited, except *Bruce v. Westcott*, (3 Barb. 374,) which is not mentioned. It also holds that the accommodation party is estopped from denying liability, or alleging against a bona fide holder, that the alteration is a forgery. The judgment should be affirmed, with costs.

[NEW YORK GENERAL TERM, May 2, 1864. *Leonard, Clarke and Sutherland, Justices.*]

MARY A. PETERS vs. HARVEY W. FOWLER.

Since the act of 1848, in relation to the rights of married women, when the wife is in possession of property under claim of ownership, her rights as owner cannot be overlooked without evidence, any more readily than if she were unmarried.

The statute has worked this change; and instead of an adverse presumption that the property connected with a business which she carried on before her marriage, and which she claimed to own as a single woman, with the property in her possession, belonged to the husband, the presumption is now in her favor, and must be overcome by the party who disputes her right or title.

The fact of coverture has ceased to have any relation to the technical right of a married woman to maintain an action in respect to her separate property; and the allegation of coverture, in the complaint, is no longer necessary.

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APPEAL from a judgment entered upon the verdict of a jury. This action was commenced September 4, 1861, to recover for merchandise, work, labor and services, sold, delivered, furnished and rendered by the plaintiff, as a milliner, to and for the defendant, between April 24, 1856, and May 4, 1857. The plaintiff was married to her present husband May 23, 1855. Her husband was a house builder. He was never interested in, or assisted her in the business. She carried on the business before her marriage, and afterwards, in her own name and on her own account. The defendant sought to set off a claim for \$60, for rent and medical services furnished to the husband of the plaintiff before her marriage, on the allegations, first, that the millinery business and property belonged in fact to the husband, and second, that the goods and labor were furnished and performed under a distinct agreement that they were to be applied to the debt of the husband. The plaintiff denied this, and the evidence on her part showed that she never heard that it was claimed that her husband was indebted to the defendant till long after the debt to the plaintiff was incurred. The defendant admitted the debt in suit in 1861, and offered to pay by rent of a house. The jury found a verdict in favor of the plaintiff for the amount claimed, with interest.

J. H. White, for the appellant.

Geo. W. Parsons, for the respondent.

By the Court, LEONARD, J. This action concerns the separate property of the wife. The code, § 114, authorizes a married woman in such case to sue alone, without the intervention of a guardian or next friend. The fact of coverture has ceased to have any relation to the technical right of maintaining an action by a married woman, in respect to her separate property; and the allegation of coverture in the complaint is no longer necessary.

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The act of 1848, in relation to the rights of married women, directs that "the real and personal estate of any female, who may hereafter marry, which she shall own at the time of marriage, and the rents, issues and profits thereof, shall not be subject to the disposal of her husband, nor be liable for his debts, and shall continue her sole and separate property, as if she were a single woman." This plaintiff carried on the millinery business and had a stock of goods at the time of her marriage, in 1855.

It cannot be said that it was disputed at the trial that the goods which were sold to the defendant were the issues or profits of that stock, inasmuch as no request was made that any question in this respect should be submitted to the jury, and no exception was taken to the charge of the judge.

There were two requests to the judge in respect to his charge, which were declined and an exception taken. 1st. That the plaintiff's services belonged to her husband, and that he had the right to bind her by the contract which he made with the defendant. 2d. That the legal title to the goods and business of the wife, although the goods were purchased by her, became by the coverture vested in the husband.

There were no services proven at the trial, and there is no recovery for such a demand, unless it be supposed that there was labor bestowed upon the millinery sold to the defendant. In that case it became inseparably connected with the article sold, and was a component part of it.

There was no evidence to support a presumption that the goods had been purchased by the husband, nor even upon any credit of the plaintiff or her husband. How the plaintiff acquired the goods, whether by cash purchases, with the proceeds of the stock belonging to her at the time of her marriage, or how otherwise, is not in evidence. It would be a violent presumption to say that the goods which were confessedly in her possession, and over which she exercised and claimed ownership, were not her separate estate, when it had been proven that she had a stock of goods and carried on the

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same business before and at the time of her marriage. I think there is no question of labor or services in the case.

The right to make a contract to dispose of the goods of his wife, involved the question of the husband's legal title, so that it may be said that the two requests to charge are contained in that single inquiry. The affirmative would deny that the property sold to the defendant was the issues or profits of real or personal property which the plaintiff had at the time of her marriage. The judge must have assumed the fact of title in the husband without evidence, had he charged as requested. Before the act of 1848, he might have so charged in compliance with the law as it then existed. Now, when the wife is in possession under claim of ownership, her rights as owner cannot be overlooked without evidence, any more readily than if she were "a single female." The statute has worked this change; and instead of an adverse presumption that the property connected with a business which she carried on before her marriage, and continued to carry on after her marriage, and which she claimed to own as a "single woman," with the property in her possession, belongs to the husband, the presumption is in her favor, and must be overcome by the party who disputes her right or title. The judge properly refused to charge as requested.

Some exceptions were taken during the trial, but the rulings were unexceptionable where the evidence was material. 1st. Evidence of entries made by the defendant in his account books, of the price of the goods in question, to the credit of the plaintiff's husband, at the time of the purchase. These entries were no part of the *res gestæ*, and were not admissible. 2d. The other questions relate to immaterial subjects, and are leading in form. The answers however could not have affected the result.

The judgment should be affirmed, with costs.

[NEW YORK GENERAL TERM, May 2, 1864. *Leonard, Clarke and Sutherland, Justices.*]

RHOADS and others vs. WOODS.

A sheriff acquires a lien upon property levied on by him under attachments, which constitutes a qualified or special title.

He is thereby authorized to take and hold possession until the demands for which the attachments were issued are paid, or until judgment and a sale of the property seized.

The assertion of that title, against a wrongdoer, in the state of New York, cannot be considered as an attempt to execute the process of another state within our borders.

The title of a foreign assignee in bankruptcy, or *in invitum*, to personal property, is admitted here, as against the bankrupt or insolvent, and the same principles are applicable here to support the special title of a sheriff, acquired under the process and laws of another state, as against any wrongdoer, or against the defendant in the process under which the sheriff seized the property.

If property levied on under an attachment is taken out of the hands of the sheriff, a reasonable sum for the expenses of regaining the possession will follow the lien of the sheriff, as an incident to the performance of his duty, and to that extent he may insist upon being repaid, if he acquires possession in a lawful manner.

Where the interest of a party entitled to the possession of personal property is of a limited nature less than the actual value of the property replevied, the jury, in an action of replevin between the actual owner and the party entitled to the possession, should be directed to assess the value of the property, only at a sum which will be equivalent to the limited interest of the defendant, therein.

THIS was an action of replevin, (tried before a referee,) to obtain possession of the brig *Gilmore Meredith*, which, at the time of the commencement of this action, May 28, 1860, was in the possession of the defendant at Brooklyn, in the harbor of New York, and was given up to the plaintiffs by the proceedings in this action. The defendant was a deputy sheriff of Hancock county, in the state of Maine, at Buck's Harbor, in which county the brig was built, in the year 1858. It was admitted on the trial that on the 12th of October, 1858, the plaintiffs and one Albert Gray were the owners of the brig, and that on the 12th of October Albert Gray conveyed one half of the brig to Andrew Gray, who afterwards, and prior to the commencement of this action,

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conveyed his interest to the plaintiffs, W. and J. R. Rhoads. The referee finds the same facts, with the variation that the plaintiff Jackson's interest was acquired December 15, 1858. The vessel was launched November 2, 1858. The defendant proved that between the 21st of October and the 4th of November he attached the said brig, by virtue of ten different attachments, for debts due by Albert Gray, or by Albert Gray and Jeremiah Grindle. Most of the attachments were served before the brig was launched; some were served after. The defendant took possession by putting two men in possession as keepers of said brig. On the night of the 13th of November, 1858, the keepers having left the brig, and neither the keepers nor the defendant, or any agent, or any one connected with them, being on board, the master of the brig, Captain Albert Gray, with the assistance of Henry Orcutt and others, sailed away from the state of Maine to Baltimore, in the state of Maryland, with the brig. On the 2d day of December, 1858, the defendant wrote to two of the plaintiffs that the amount due on the attachments was about \$2000, and claiming that when the vessel was taken from his possession the attachments were in force, and desiring to know if they would pay the amount due thereon, without the necessity of his pursuing the vessel and retaking her; to which no answer was received. The brig remained at Baltimore until about January 1, 1859, when she came to New York, where she arrived prior to January 12, 1859. Between the 9th and 11th of April, 1859, the plaintiff William Rhoads and the defendant had an interview in New York, at which the defendant claimed as the amount due on the attachments, for the amount of the claims and for the defendant's trouble, expenses and costs, the sum of \$2500. In this amount the defendant included a charge of about \$500 for coming to New York; and he claimed for costs after the vessel left, including the Newcomb claim, five or six hundred dollars. This claim to receive \$2500 was in answer to the offer of the plaintiff to pay all just claims. At this interview the plain-

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tiff offered to pay in gold the amount of the Newcomb attachment, the only unpaid attachment. This offer the defendant denied, and this is the only disputed fact in the case. Immediately after this interview, and on the 12th day of April, 1859, at Brooklyn, the defendant put the captain and mate of the brig out of the way, by causing them to be arrested on a criminal complaint, and then forcibly took possession of the brig as *deputy sheriff*, the brig at the time being in the possession of the plaintiffs, the owners. The defendant *did not take the brig back to Maine* to be disposed of according to law, but, as the plaintiffs insisted, kept her *for the purposes of extorting illegal fees, in the city of New York*, until the end of the month of May, 1859, when she was taken out of the defendant's possession by this suit. The plaintiffs, between the 23d of April and 6th of May, 1859, settled in Maine the claims of all the plaintiffs in the attachment suits, together with their costs, excepting that of S. B. Newcomb, (amounting to \$88,) and on the 3d of May they paid the defendant, in Maine, his fees in seven of the suits, \$75. The claim in the Newcomb suit was contested, and was paid in April or October, 1860. At the time of the trial it appeared that Newcomb's claim was paid, and that the defendant could only claim on account of fees, the sum of \$85.87. The referee reported in favor of the defendant, directing a judgment, which was entered, for a return of the vessel; or if such return could not be made, then for the value of it, assessed at \$10,000, with costs. From the judgment entered upon the report the plaintiffs appealed.

Beebe, Dean & Donohue, for the appellants.

Thos. H. Rodman, for the respondent.

By the Court, LEONARD, J. 1. The referee has found that the defendant was in possession of the vessel by virtue of the

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attachments in his hands as deputy sheriff, at the time she was taken out of the jurisdiction of the state of Maine, on the 13th of November, 1858. The evidence fully supports the facts so found. The sheriff acquired a lien by virtue of the levy under the attachments, and that constituted a qualified or special title. He was thereby authorized to take and hold possession until the demands were paid for which the attachments were issued, or until judgment and a sale of the property seized. The assertion of that title against a wrongdoer in the state of New York cannot be considered as an attempt to execute the process of another state within our borders.

The temporary absence of the keeper or person in charge for the sheriff in the state of Maine without leave, was not a relinquishment of custody. The act of the master in unmooring the vessel and taking her out of the bailiwick of the sheriff was a misdemeanor; probably under the laws of the state of Maine it was a felony; the owners acquired no legal right thereby to detain the vessel from the sheriff.

The title of a foreign assignee in bankruptcy, *or in invitum*, to personal property, is admitted here as against the bankrupt or insolvent. (*Holmes v. Remsen*, 20 John. 229. *Story's Conf. L.* §§ 410 to 420, and notes. 2 *Kent's Com.* 406, and notes.)

The same principles are applicable here to support the special title of the sheriff acquired under the process and laws of another state, as against any wrongdoer, or against the defendant in the process under which the sheriff seized the property. The exceptions to the report in this respect are not well taken.

2. The plaintiffs except to the report because the referee did not find that the defendant took possession of the vessel at New York by violence. There is no evidence in the case of any violence, in this respect. The referee has found that the defendant repossessed himself of the vessel about the 12th of April, 1859, at New York. The evidence is that the officers of the vessel were arrested and taken to prison, and then

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the defendant took possession. This was not a voluntary relinquishment of the vessel to the defendant. There is no evidence, however, that the defendant caused the arrest. If the defendant regained possession without fraud or force, there was no breach of the peace, and no violation of the laws of this state, and the possession of the defendant cannot be disturbed. It would have been eminently proper for the defendant to have sought the protection of our laws in respect to his title. The owners or claimants in possession here might have desired to insist that the courts in Maine had not jurisdiction to grant the attachments; the process under which the levy was made might have been void; or the debt for which it was issued might have been paid. There is no exception to the report, and no evidence on the part of the plaintiffs to support one, in respect to any fraud or violence by the defendant to repossess himself of the vessel. The report cannot be disturbed on this ground.

3. The plaintiffs also except that the referee has not found that the plaintiffs offered to pay, and tendered to the defendant all his claim, costs, and charges against the vessel. The evidence is that the plaintiffs offered to pay all just claims and legal costs, and the defendant required them to pay \$2500, in order to discharge the vessel. The referee has not found what was the amount of the defendant's lien against the vessel at this time; nor whether the plaintiffs offered to pay the amount due; nor what demand the defendant made in this respect. The aggregate of the demands claimed by the attachments in the defendant's hands indicate that he included in the sum which he required the plaintiffs to pay about \$500, for expenses incurred in regaining possession. It may be that the defendant required the plaintiffs to pay more than he could lawfully claim.

A reasonable sum for the expenses of regaining possession followed the lien of the sheriff, as an incident to the performance of his duty, and to that extent he might insist upon being paid, if he acquired possession here in a lawful manner.

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Whether the amount claimed for expenses was a legitimate and reasonable sum for such expenses the referee has not found, and the evidence does not afford him the means of deciding. The offer of the plaintiffs amounted to nothing definite; they made no tender. There is no exception on this ground, that can be maintained.

4. The plaintiffs also except that the referee should have found for the defendant only the amount of his claim and costs. The action is replevin. The referee has assessed the value of the vessel at \$10,000, and given judgment for the return thereof to the defendant, or if such return cannot be made, then for the said value. This is erroneous. Where the interest of the party entitled to the possession is of a limited nature, less than the actual value of the property replevied, the practice has long prevailed to direct the jury to assess the value as against the actual owner only at a sum which would be equivalent to such limited interest. This practice was adopted under the provisions of the revised statutes, prior to the code, to avoid circuity of action, and it has since continued under the code. The provision of the revised statutes was similar to section 277 of the code in respect to the assessment of the value of the property replevied. It has been held in several cases that the provision of the revised statutes, in respect to assessing the value, must be so construed as to cover only the value of the special or limited interest of the prevailing party in an action between the actual owner and a party having a limited interest. (*De Witt v. Morris*, 13 *Wend.* 496, 499. *Russell v. Butterfield*, 21 *id.* 300.) The code, section 277, must be construed in the same manner. (*Alt v. Weidenberg*, 6 *Bow.* 178.) This rule of construction is necessary and just.

It would be indefensible to allow the defendant in this action to recover \$10,000 against the plaintiffs. No such sum is required to indemnify him. We might reduce the sum to the proper amount, but there is no evidence, and no

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fact found by the referee which will enable us to fix the precise sum which the defendant ought to recover.

The judgment should be reversed, and the case sent back to the referee for a new trial, with costs to abide the event.

[NEW YORK GENERAL TERM, May 2, 1864. *Leonard, Clarke and Sutherland, Justices.*]

THE UNITED STATES TRUST COMPANY *vs.* WILEY and others.

A debtor who has been served with a notice that an attachment has been granted against the property of his creditor, has no standing in court to interplead his creditor and the plaintiffs in the attachment.

Where a trust company received a sum of money in deposit, and issued a certificate to the depositors, by which it agreed to allow interest at the rate of four per cent, and to repay the sum deposited, to the depositors or their assigns, with interest, on sixty days' notice; *Held* that the company could not bring a suit to compel the depositors, and creditors who had attached the fund in the plaintiffs' hands, to interplead in respect to their respective rights and equities in the fund.

APPEAL from a judgment of the special term, dismissing the complaint, on demurrer. On the 15th of June, 1861, the defendants, as assignees of Lanes, Boyce & Co., deposited with the United States Trust Company \$60,000, for which the company gave them a certificate of deposit, by which it agreed to allow the depositors interest, at the rate of four per cent, and to repay the same, on sixty days' notice, with interest, to the depositors or their assigns, on the return of the certificate. Since then various others of the defendants have claimed said fund as creditors of Lanes, Boyce & Co., alleging that the assignment to Wiley and Lawrence was fraudulent. The late sheriff of New York had served various attachments on the funds in the plaintiffs' hands in suits founded on judgments recovered by creditors against Lanes, Boyce & Co., and impleaded the plaintiffs in said attachment suits. The plaintiffs had also been made defend-

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ants in twenty-one other suits instituted by judgment creditors of said Lanes, Boyce & Co., in which suits the funds in the plaintiffs' hands were claimed. The plaintiffs had also been served with notices in ten other suits commenced against Lanes, Boyce & Co. by judgment creditors, in which the plaintiffs claimed to have acquired a lien on the funds in the Trust Company's hands, which were prior to the liens so claimed by the sheriff, and required the plaintiffs, at their peril, to protect said funds against the other claimants. The plaintiffs in their complaint alleged that they did not know which, if any of these various claimants, were entitled to the funds, and asked that the defendants might interplead. The defendants Lawrence and Wiley, assignees as aforesaid, demurred to this complaint, and on the 12th of March, 1863, Judge Mason, at special term, gave judgment in favor of the defendants, sustaining the demurrer and dismissing the complaint. The following opinion was delivered by him :

MASON, J. "The plaintiffs are not bailees, upon the facts stated in this complaint, but must be considered as the debtors of Wiley and Lawrence, for these moneys deposited with them. (*Commercial Bank of Albany v. Hughes*, 17 Wend. 94. *In the matter of the Franklin Bank*, 1 Paige, 249. 2 Seld. 412.) And by the terms of the deposit in this case the plaintiffs had the right to use the money by paying four per cent interest; and they were not liable to pay the same until they had received sixty days' notice and the certificate which they issued to these depositors was returned to them. By the very terms of the agreement between the plaintiffs and Wiley and Lawrence, as shown by the certificate which the plaintiffs gave them, they must be regarded as borrowers of this money on time, at four per cent interest. This certificate acknowledges the receipt of the money, and contains an absolute promise to pay the amount to Lawrence and Wiley, with four per cent interest, on sixty days' notice given to them.

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It is most manifest, therefore, in this case, that when the plaintiffs received this \$60,000 from Lawrence and Wiley, assignees of Lanes, Boyce & Co., and gave back to them this agreement to repay the same, as above stated, they became absolutely the debtors of Lawrence and Wiley to that amount. This being so, I do not know of any principle of equity upon which the plaintiffs can claim the right to interplead their creditors, Lawrence and Wiley, with these strangers who claim the fund by a hostile and paramount title. These plaintiffs have a perfect right to pay this deposit to their depositors without incurring any liability to the other creditors of Lanes, Boyce & Company, upon the facts stated in this complaint. The plaintiffs have no right to maintain this suit to interplead Lawrence and Wiley and the other creditors of Lanes, Boyce & Co.

No case can be found in the books where a debtor has ever sustained a bill to interplead his creditor and an outsider—a mere stranger—who had no other claim to assert than a mere equity against the creditor to reach the fund loaned; and this really is all there is in this case. The case seems to me too plain for discussion or the citation of authorities.

The demurrer is well taken; for the complaint does not state facts sufficient to sustain a suit of interpleader, and judgment is therefore given for the defendants, upon the demurrer, with costs to be taxed."

The plaintiff appealed from this decision to the general term.

E. S. Van Winkle, for the appellants.

J. Larocque, for the respondents.

By the Court, LEONARD, J. A debtor who has been served with a notice that an attachment has been granted against the property of his creditor, has no standing in court to inter-

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plead his creditor and the plaintiffs in the attachment. I am unable to perceive in what respect the present plaintiff has a better case for interpleader. It is, perhaps, not impossible that the money deposited with the plaintiff may be reached by the creditors of Lanes, Boyce & Co. Upon this question it is not necessary to express any opinion. Should such creditors obtain any adjudication which will compel the plaintiffs in this case to apply the deposit on the demands of those creditors, instead of paying it to the depositors, it can be done only under circumstances affording full indemnity. The Trust Company have agreed to pay the deposit to certain persons, with interest. They cannot invoke the intervention of this court to disregard that contract, and inquire into the equities existing between the depositors and a class of persons who have no immediate, but only remote and contingent rights (if any) in respect to the fund.

It would cast upon the court the duty of adjudging in a collateral action, whether the creditors of Lanes, Boyce & Co. can obtain a judgment declaring an assignment made for the benefit of creditors null and void. The creditors may not be in a situation to institute any such inquiry in court, or they may not desire to do so. A collateral inquiry into the merits of such a question ought not to be encouraged.

The claim of the creditors of Lanes, Boyce & Co. against the depositors or the fund, is too remote and contingent to be considered as a ground of interpleader. The manuscript opinion of Judge Ingraham in the case of *Duncan, Sherman & Co. v. Bates and others*, is directly in point here.

The judgment should be affirmed, with costs.

[NEW YORK GENERAL TERM, May 2, 1864. *Leonard, Clerks and Sutherland, Justices.*]

MIDDLEBROOK vs. THE MERCHANTS' BANK.

Our courts will not recognize the right of a foreign executor or administrator *to sue* in the courts of this state under or by virtue of his foreign letters testamentary or of administration.

But if foreign executors, with full authority to do so, transfer to another stock in a bank located here, and execute a power of attorney for its transfer on the books of the bank, the officers of the corporation are bound to recognize the assignee's title to the stock, and his right to have it transferred to him on the transfer books; and in case of refusal, the bank may be decreed to make the transfer, where there are no rights of domestic creditors to be affected.

A PPEAL from a judgment entered at a special term, after a trial at the circuit before the judge without a jury. The action was brought to compel the defendants to allow certain shares of its stock to be transferred to the plaintiff. The judge found the following facts, viz: That Robert Middlebrook, late a resident of the town of Trumbull, within the probate district of Bridgeport, in the county of Fairfield, and state of Connecticut, died at said Trumbull on or about the 15th day of May, 1861. That at the time of his death he was the owner of one hundred shares of the capital stock of the said defendants, of the par value of \$50 per share, and held the defendants' certificates for the same, which shares were declared to be transferable on the books of said defendants, by himself or his attorney, on the surrender of the said certificates. That on the 15th day of April, 1861, said Robert Middlebrook made and published his last will and testament in writing, under his hand and seal, and thereby, among other things, appointed Mallett Seeley, William M. Curtis and James R. Middlebrook executors of his said last will and testament. That on the 22d day of May, 1861, the executors exhibited the said last will and testament in the court of probate for the said district of Bridgeport, the jurisdiction whereof belonged to the said court of probate, and duly proved the said will, and the same was approved and ordered to be recorded by the said court of probate, according to the

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laws of the state of Connecticut, and the said executors were duly qualified as such executors, according to the laws of that state, and accepted said trust. That in and by the said will, among other things, the said Robert Middlebrook gave to his son, the plaintiff, \$16,000 in bank stock, which he, the said plaintiff, was, according to the provisions of the said will, to select from a large amount of bank stock owned by the testator, and which was to be appraised. That the plaintiff, among other shares of bank stock, selected fifty shares of the stock of the defendants, being one half of the shares of stock so owned by the testator in the said Merchants' Bank, and the same were appraised and inventoried by the executors, pursuant to the directions in the will, and the executors assented to such selection and appraisal. And that afterward the executors executed and delivered to the plaintiff, at Bridgeport, a bill of sale and assignment, under their hands and seals, of fifty shares, parcel of the said one hundred shares of stock, and delivered to him the certificates of the said fifty shares of stock, and did also appoint, under their hands and seals, Ebenezer Seeley their attorney, irrevocable, for them, and in their names, to transfer the said shares on the transfer books of the defendants into the name of the plaintiff. That the defendants had full notice of all the facts aforesaid. That the said attorney, so appointed and empowered to transfer the shares on the said books, on the 21st day of March, 1862, applied to the defendants, at their banking house in the city of New York, and presented the said instrument of sale and assignment of the said fifty shares and the said power of attorney, and also the certificates of the said fifty shares, and offered to surrender them to the defendants, and demanded leave to transfer the same on the transfer books of the defendants into the name of the plaintiff. That the defendants refused to allow the said transfer to be made, alleging that said executors had not power to transfer, or authorize any other person to transfer the said shares on the books of the defendants, without first tak-

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ing out letters testamentary or of administration in the state of New York. That after the death of said Robert Middlebrook, and before the execution of the said bill of sale to the plaintiff, three half-yearly dividends were declared upon the capital stock of the said bank, and were paid to the said executors, on proof to the bank of the will and the granting of said letters testamentary. That no letters testamentary or of administration of the will, or upon the estate of said Robert Middlebrook, were ever taken out by the said executors, or by any other person, in the state of New York. That there were no debts due from the deceased to any person residing in this state, nor were there any claims of any kind upon the estate of the deceased in favor of any person residing in this state, which have been presented to the executors. That the estate of the deceased had been settled in the said probate court by the executors. That the defendants are a banking association or incorporation, formed and organized under the general banking laws of the state of New York, by articles of association dated the 15th day of January, 1856, and signed by said Robert Middlebrook, which articles provide (among other things) that the place of business of the defendants shall be in the city of New York, and that suitable books shall be kept for the registry and transfer of the shares of their capital stock, and that every transfer, to be valid, shall be made on the books of the association, and shall be signed by the shareholder, his attorney or legal representative; and that since said organization of the defendants, their place of business has been and is in the city of New York, and books of registry and transfer of the shares of their capital stock have been and are kept at their said place of business in the city of New York. And, as conclusions of law, the judge found and decided: 1st. That the executors, under and by virtue of the will and the proceedings in the probate court, became the owners of the said shares of stock, and had a right to sell and dispose of the same and authorize their transfer on the books of the

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bank. 2d. That the said plaintiff, under the said will and the selection and appraisal aforesaid, became the owner of the said fifty shares, and had a right to require of the executors a formal transfer of the same on the transfer books of the defendant, from the name of the said Robert Middlebrook into his own name, and that under and by virtue of the said transfer, assignment and power of attorney, the plaintiff acquired the right to have the said stock transferred into his own name on the books of the defendants. 3d. That the plaintiff is entitled to the judgment and decree of this court directing the defendants to transfer the said fifty shares of stock into his own name on their books, and to his costs in this action.

Judgment was entered accordingly, and the defendant appealed.

B. W. Bonney, for the appellant. I. The Merchants' Bank is a corporation created by and under the laws of New York, having its only locality in the city of New York, where alone transfers of its stock can be made. Therefore the property in question has a *fixed situs* in the city and state of New York, is peculiarly subject to the laws of New York, and, in that respect, is distinguishable from other personal property.

II. It is well settled that no administrator or executor can maintain an action in the courts of the state of New York, without first obtaining letters testamentary or of administration under the laws of the state. No letters obtained in any foreign country or foreign state are sufficient to authorize the maintenance of an action here. (*Campbell v. Tousey*, 7 Cowen, 64. *Morrell v. Dickey*, 1 John. Ch. R. 156. *Chapman v. Fish*, 6 Hill, 554. *Isham v. Gibbons*, 1 Bradf. 69.)

III. Letters testamentary or of administration, issued in, and by authority of, a foreign state or foreign country, of the will or upon the estate of a decedent resident in such state or country and there deceased, give to the executor or

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administrator therein named no authority or right to transfer, control, demand or maintain action for, any stock or other personal property having a situs or locality in this state, or which is here held; to obtain any such authority or right, the executor or administrator must obtain letters in this state. (*Williams v. Storrs*, 6 John. Ch. R. 353. *Chapman v. Fish*, 6 Hill, 554. *Vroom, adm'x, v. Van Horne*, 10 Paige, 549. *Parsons v. Lyman*, 20 N. Y. Rep. 103. *Riley v. Kiley*, 3 Day's Conn. R. 74. *Vaughan v. Barrett*, 5 Verm. R. 333. *Lee v. Havens*, *Brayton*, 93. 2 R. S. 71, § 17. *Thomas, ex'r, v. Cameron*, 16 Wend. 579.)

IV. The executors of Robert Middlebrook, having no right to or interest in the stock in question, or authority to control or transfer such stock, except under his will, could not show title thereto, or maintain any action to enforce their alleged rights, without first taking letters testamentary within this state. The bank was created by the law of New York, and, by force of that law and the terms of the charter under it, the stock of the bank, as well as the bank itself, has a *fixed locality here*, and can be transferred only in this state.

V. The plaintiff contends, that the executors, although without power themselves to transfer the stock on the books, or to maintain any action for it or for its proceeds, have, by a conveyance, executed in Connecticut, and by a power of attorney in such conveyance contained, given to and vested in other persons, such title to and power over the stock, as enables them, by action, to compel the bank to make or permit the transfer; that is, that the executors could give and have given to their transferee and agent, greater rights and powers than they had themselves.

VI. The rights of creditors and others, resident in New York, require for their protection that administration of the assets of all deceased persons found in this state shall be had here. Except by due publication of notice pursuant to statute, it cannot be ascertained whether or not there are, in this state, creditors of any decedent, entitled to protection and

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payment here; nor can such creditors be otherwise informed to whom, where or when to present their claims. Besides, it would subject the corporations of this state to great hardship, and be manifestly unjust to them, to hold that, upon the production of the probate of a will, purporting to have been made by a stockholder resident in any foreign country and there to have been proved, and letters testamentary granted thereon, the corporation must forthwith determine as to the validity and sufficiency of such will and letters to authorize the transfer of their stock.

VII. It cannot be deemed a hardship upon persons claiming through decedents who have resided in foreign states or foreign countries, and have made investments in the stocks of corporations here, to require them to show title in such stocks, in the same manner in which residents here are required to show their title, and under authority derived through the constituted tribunals of the state.

VIII. The right claimed by the plaintiff is not supported by any recognized legal principle, or by authority by which this court is bound; and the principle for which he contends is in conflict with the rights of residents here. (*Pond, adm'r, v. Makepeace*, 2 Metc. 114. *Gleim v. Smith*, 2 Gill & John. 493. *Dayton's Sur.* 3d ed. 194. *Willing v. Perrot*, 5 Rawle, 264. *Stearns v. Burnham*, 5 Maine Rep. 261. *Thompson v. Wilson*, 2 N. Hamp. Rep. 291.)

E. Seelye, for the respondent. I. On the death of the testator the title to his personal property, wherever situated, vests immediately in his executor. That is the uniform doctrine of the common law, in England and in this country, recognized by the books every where. (*Babcock v. Booth*, 2 Hill, 181. *Valentine v. Jackson*, 9 Wend. 302. *Cole v. Miles*, 17 Eng. L. and Eq. Rep. 582. *Franklin v. Bank of England*, 9 B. & C. 156. *S. C.* 17 E. C. L. R. 78.)

II. This ownership of personal property involves the right to dispose of it, and the executor is bound to dispose of it in

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virtue of his office; and if the will requires any particular disposition of any part of the estate, it thereupon becomes the duty of the executor to carry such provision into effect.

III. In the present case the plaintiff was entitled to certain shares of bank stock by the terms of his father's will. He had a right to make a selection out of all his father's bank stock of a certain amount, the value of which was to be appraised. On such selection and appraisal and their assent to it, the plaintiff had a right to require the executors to transfer the shares so selected and appraised to him; and if they had refused to do so, he would have had his legal remedy to oblige them to do it. After such selection and appraisal, and the assent thereto by the executors, the legacy became specific. These shares thereby became separated from the general property of the testator, like the cases mentioned in the books, where a certain sum of money in a certain bag or chest, or in navy or India bills, or a certain sum of money in the hands of A, or a certain balance due to the testator from his partner, which are all specific. (*See the cases and analogous ones cited in Toller's Executors, 302.*) No matter how specific a legacy may be, the title vests in the executor until he assents to the legacy. (*See Franklin v. Bank of England, supra.*) After such assent, the title of the legatee is absolute, and he has his remedy at law to enforce it. In the present case, therefore, it was the unquestionable duty of the executors, after their assent to the selection and the appraisal, to transfer the shares in question to the plaintiff. This they offered to do on the books of the bank, and the bank, in violation of their clear duty, refused to allow it to be done. Thereupon the executors, by an instrument *in pais* duly executed, transferred the shares directly to the plaintiff, who, on the presentation of that instrument to the defendants, became entitled to transfer the shares into his own name. And the defendants refused to allow him to do that. It only remained for him, therefore, to bring his action, as every party must do whose rights are withheld.

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IV. The defendants, after paying the dividends on the testator's bank shares to the executors, and recognizing their title as such executors to receive those dividends, are estopped from denying their right to the shares themselves. If the dividends belonged to the executors, as the defendants admitted, so also did the capital stock of the bank, of which those dividends were the fruit. The bank cannot be allowed capriciously and perversely to separate the one from the other; admitting the right of the executors to the dividends, and denying it as to the stock itself.

V. Every principle necessary to sustain the plaintiff's right in the present case, is recognized throughout the very elaborate judgment of the court of appeals in the case of *Parsons v. Lyman*, (20 N. Y. Rep. 103.) And the opinion of Mr. Justice Clerke (pp. 124-127) contains every thing which is required to support the ruling in this case.

VI. It is not denied on the part of the plaintiff, that if a man brings an action as executor in this state, no evidence of his executorship, other than of letters testamentary granted here, will be received. That is the technical rule of practice, and that is the extent of the rule. In *Harper v. Butler*, (2 Peters' S. C. Rep. 239,) exception was taken to the plaintiff's right to sustain the action, on the ground that he derived his title to the promissory note on which the suit was brought, from an executor appointed under the laws of another state. The court, by Marshall, C. J. overruled the exception, holding that as it was not necessary for the plaintiff to sue as executor, though he derived his title from the executor, he might, as assignee, sue in his own name. It was said of this case in the court below, that it was not very much argued. The answer to that suggestion is, that there was no question presented which called for much discussion, or admitted of any illustration clearer than the case itself. In *Peterson v. The Chemical Bank*, decided by the superior court at general term, February 12, 1864, Robertson, C. J. giving the opinion of the court, the same question was presented. An adminis-

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trator, with the will annexed, under a grant from the court of probate of New Haven, had assigned a deposit made by the deceased, to the plaintiff, who brought his action in his own right, and it was held he was entitled to recover. There never was any serious question as to the right of a plaintiff, under the circumstances of the present case. Some few corporations, feeling their power, have, from time to time, held out, and obliged needy parties to subject themselves to the expense, vexation and delay of taking out letters testamentary in this state; which, after being granted, are, in truth, no higher evidence of such plaintiff's right than the record of a similar grant by the probate court of a neighboring state, exemplified according to the act of congress. It is quite time that the courts should put an end to this useless annoyance.

SUTHERLAND, J. It is not necessary to examine or determine the question whether the personal estate of the testator, on his death, vested immediately in his executors, the plaintiff's assignors, and before the will was proved, and they qualified as executors. The bank put its refusal to permit the transfer solely on the ground that letters testamentary, or of administration, had not been taken out in the state of New York. Before the assignment to the plaintiff, and the refusal of the bank to permit the transfer to him under the power of attorney, the executors had exhibited to the officers of the bank documentary evidence of their title as foreign executors. The ground upon which the bank refused to permit the transfer to the plaintiff, and the ground upon which the counsel of the bank upon the argument insisted it was justified in so refusing, was, substantially, that the bank was not obliged to recognize the title of a foreign executor. In this I think the bank and its counsel were mistaken.

The cases in this state only show, I think, that our courts will not recognize the right of a foreign executor or administrator *to sue* in the courts of this state under or by virtue of his foreign letters testamentary or of administration. (*See*

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Parsons v. Lyman, 20 N. Y. Rep. 103, and cases there cited.)

I suppose there is no reasonable ground for saying that the title to the testator's bank stock in this state, as well as to all his chattels and personal estate, wherever situate or being, vested in his executors, either by the will on his death, or by the issuing of letters testamentary to them, or both. Having the title to the bank stock in question, they had a right to assign it to the plaintiff, and to execute the power of attorney authorizing the transfer to him.

I do not know that it has ever been questioned but that even a foreign statutory bankrupt proceeding passed the title to the bankrupt's property here, as between the bankrupt and his assignees. The cases in this state only go to show, I think, that the plaintiff's assignors, as Connecticut executors, could not have maintained an action against the bank for refusing to permit them to transfer the shares. Perhaps you may say that the bank was not *legally* bound to permit the transfer on the demand of the executors, before the assignment to the plaintiff, because the executors could not as foreign executors bring an action for such refusal, *in their own names as such executors*; but if the executors could and did transfer the shares of stock to the plaintiffs, and could and did execute the power of attorney for its transfer on the transfer books, the bank, I think, was bound to recognize the plaintiff's title to the stock and his right to have it transferred to him on the transfer books; and for refusing to permit such transfer, I think the bank is liable in this action, brought in the name of the assignee of the executors.

It is utterly immaterial whether the assignment to the plaintiff, and the power of attorney for the transfer of the stock, were executed in Connecticut or in this state.

The judgment should be affirmed, with costs.

LEONARD, J. The law of the foreign domicile of the testator and the executors governs in respect to the transfer of

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personal property, except, perhaps, where the transfer interferes with the remedy of domestic creditors in the courts of the state where the property is situated, I concur. The judgment should be affirmed, with costs.

CLERKE, J. also concurred.

Judgment affirmed.

[NEW YORK GENERAL TERM, May 2, 1864. *Leonard, Clarke and Sutherland, Justices.*]

CATHARINE DOBKE and another, *appellants*, vs. ISABELLA
McCLARAN and others, *respondents*.

The legislature, by repealing the provision of the revised statutes, declaring that no surrogate shall "under any pretext of incidental power or constructive authority, exercise any jurisdiction whatever, not expressly given by some statute of this state," intended that a surrogate should have the incidental power to open or correct a decree made through fraud or a mistake as to a material fact.

Hence if the surrogate believes a motion to open a previous decree, declaring that a will was not duly executed and attested, is made in good faith, and that it is reasonably probable, from the papers on both sides, that such decree was made under a mistake as to what the witnesses to the will had in fact sworn to, or that the witnesses, from not understanding the questions put to them, omitted to state facts material to show the due execution of the will, he has power to grant the motion, as incident to his statutory power to take the proofs as to the execution of a will and to admit the same to probate, or otherwise.

APPEAL from an order of the surrogate of the county of New York denying a motion made by the appellants to rescind or open a previous decree of the surrogate, declaring that a certain instrument propounded by the appellants, the executors named therein, as the last will and testament of John Munro, deceased, was not executed and attested according to law, and that it was null and void. The motion was denied by the surrogate solely on the ground, as stated in the order, that the surrogate had no power to grant the motion, or afford the relief asked for.

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Edmon and Benj. J. Blankman, for the appellants.

Henry Richardson, for the respondents.

SUTHERLAND, J. The appeal is only from the order or decree of the 7th of February, denying the appellants' motion to rescind or open the previous decree of the 24th of September, declaring that the will was not executed and attested according to law, and that it was null and void, and to hear further proofs. This last mentioned decree I do not consider to be appealed from. The order of the 7th of February declares on its face, that the motion was denied "on the ground that the surrogate has no power to grant the said motion, nor any part of the relief asked for." We must assume, then, that the motion was denied *solely* on the ground of a want of power.

If the surrogate had *power* to grant the motion, the order should be reversed, though we may think, if the surrogate had considered the motion on its merits, that he probably would have denied it on the merits.

Now after a careful consideration of the question of power, which is not free from difficulty, I am not willing to hold that the surrogate had not power to grant the relief asked for by the motion. I think the surrogate might and should have considered the motion as made substantially upon the ground that the decree of the 24th of September was made under a mistake as to the facts. On this question of power, the facts stated in the petition and affidavits on which the motion was made, must probably be taken to be true. If true, they show that the will was in fact duly executed; that the witnesses to the will are Germans, understanding English imperfectly; that when examined in the proceeding to prove the will, they were examined in English, that is, they were questioned in English; and that they were denied an interpreter. Without referring to the facts stated in the papers on which the motion was made, in detail, I think it may be said that, if true, they show that the witnesses to the will, on their examination in the proceeding to prove the will, may not have stated all

the material facts in relation to the execution of the will, because being questioned in English, they imperfectly understood the questions put to them. If the case made by the papers on which the motion was made showed this, I think it showed that the decree of the 24th September, declaring the will not to have been legally executed and attested, *may* have been made under a material mistake as to the facts relating to the execution of the will. If so, I think the surrogate erred in denying the motion solely and exclusively on the ground of want of *power*.

Of course I do not mean to intimate an opinion that the motion should have been granted had it been considered by the surrogate on its merits. Such motions should be viewed with suspicion, and granted with the utmost caution; but, as I have said before, I am not willing to hold that the surrogate had not power to grant the motion. If he believed the motion to have been made in good faith, and that it was reasonably probable, from the papers on both sides, that the decree of the 24th of September had been made under a material mistake as to what the witnesses to the will had in fact sworn to, or that the witnesses, from not understanding the questions put to them, omitted to state facts material to show the due execution of the will, I think he had power to grant the motion. I think he had this power as incident to his statutory power to take the proofs as to the execution of the will, and to admit it to probate, or otherwise.

I understand Judge Daly in *Brick's case*, (15 *Abbott's Pr.* 36,) to concede that the surrogate may undo what has been done by fraud or under a mistake of fact. (*See also Sipperly v. Baucus*, 24 *N. Y. Rep.* 46, and the cases there cited.)

I think it is to be inferred that the legislature, by repealing the provision of the revised statutes, declaring that no surrogate should, "under any pretext of incidental power or constructive authority, exercise any jurisdiction whatever not expressly given by some statute of this state," intended that a surrogate should have the incidental power to open or cor-

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rect a decree made through fraud or a mistake as to a material fact. (*Laws of 1837, p. 531.*) I think such power may be necessary to prevent the greatest injustice.

Of course, the surrogate having denied the appellant's motion *solely* on the ground of a want of power, it is not necessary to inquire whether the respondents' papers in opposition to the motion were an answer to it, or to what extent the statements in the moving papers were contradicted, explained or qualified by them.

In deciding the question presented by this appeal, I think we should look only to the case made by the moving papers, and to the record of the prior proceeding to prove the will.

My conclusion is, that the order of the surrogate appealed from should be reversed.

LEONARD, P. J. The power of revoking letters of administration irregularly and improperly obtained upon false suggestions has been approved on sufficient authority. (*Proctor v. Wanmaker, 1 Barb. Ch. 302.*) By a parity of reasoning, if probate was refused by mistake or misapprehension, the decree should be opened and the application reheard. It is within the incidental powers referred to in the cases cited by the counsel for the appellant.

I am unable to find any authority for granting a rehearing in a case before the surrogate when it has been regularly heard and submitted on the merits. There is reason to apprehend that this matter has been submitted and decided under a mistake, where the surrogate would relieve the party if he believed the power existed for him to do so. The authorities in such cases warrant us in holding that the surrogate has the power to open his decree, in his discretion, and rehear the question on the merits. (*1 Barb. Ch. Rep. 452; Id. 302.*)

I concur in reversing the order appealed from.

CLERKE, J. also concurred.

Order reversed.

[NEW YORK GENERAL TERM, May 2, 1864. *Leonard, Clarke and Sutherland Justices.*]

MCNAMEE vs. TENNY.

An acknowledgement, to take a case out of the operation of the statute of limitations, need not express any intention to pay the debt. An intention to pay is to be presumed.

If the debtor acknowledges the existence of the debt, in writing, the provisions of the law are met, and the statute of limitations will not attach.

What is a sufficient identification of the debt, in the acknowledgment.

In the absence of proof that other demands existed, to which the acknowledgment of the debtor might apply, the presumption is that it applied to the demand proven.

To remove any uncertainty or doubt upon that subject, parol evidence is admissible. SUTHERLAND, J. dissented.

ACTION upon a promissory note made by the defendant, on the 21st of March, 1854, for \$540.43, payable to the order of McNamee, Goodrich & Co., six months after date, with interest, of which the plaintiff was the holder. The answer set up the defense of the statute of limitations. To rebut this defense, by proving an acknowledgment of the debt within six years, the plaintiff offered in evidence several letters from the defendant, addressed to him. The defendant's counsel objected to them severally as evidence, and to their being read in evidence, on the grounds that the same were irrelevant and incompetent, and also that they were offers to compromise the controversy. The court overruled the objections, and admitted the letters in evidence, to which ruling and decision as to each of said letters, the defendant's counsel excepted. The plaintiff's counsel thereupon read them in evidence to the jury. The first, dated Elmira, February 2, 1859, was as follows: "I have been working at my matters since you was here, and find that I can get two-thirds of my indebtedness off; but dreading to take the act for the name of it, I have come to the conclusion that I would borrow of my friends, providing that I can make a satisfactory arrangement. I propose to pay all my creditors 20 per cent cash on the original notes or bills; that is the best that I can do, and that is more than I can do without help. Answer immediately."

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The second letter was dated February 7, 1859, and was as follows: "Yours of the 5th inst. came to hand this morning, with one from Ames, Herrick & Barnes, 51 John street; they accept my proposition. I make the same offer to one and all alike. If I cannot make it a general thing, I shall try the other way. I have promise enough, full two-thirds, without any of my N. Y. creditors, but one firm will sign the petition there; but for the name of it I will borrow and get, and honorably if I possibly can. I have partly the promise of enough to pay 20 per cent on the original am't; as I have a full list of every shilling of the am't I owe, I know just what it will take. I think I can get \$1000; that will not pay quite 20 per cent, but I can make up the difference in some way, and make a final settlement. Hoping you will consent and all the rest of my creditors, which I shall always remember with gratitude." There was a post-script to this letter in these words: "The am't to you at the above rate would be \$108.09 *cash*."

In a third letter, dated Elmira, September 24, 1860, the defendant said: "Yours of the 22d was this day rec'd. In reply I hardly know what to say. I expect to make some arrangement with my friends who will be here during the fair, and then will write you; or rather I shall be in N. Y. 2 weeks from to-day, if nothing happens, and will call and see you."

The plaintiff was examined as a witness, and testified as follows: "I am the plaintiff; was one of the late firm of McNamee, Goodrich & Co., the payees of the note. All the letters which I ever wrote to the defendant related to the note in question. This note was given to my late firm for goods sold and delivered by them to the defendant. It was the only transaction my firm or myself ever had with the defendant. I never talked or wrote to him about any other claim or note than the note in suit. These letters received in evidence were all received by me from the defendant, and related to this note. The letter dated September 24th was received by

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me a day or two after September 24, 1860. I have computed the interest upon the note. I make the interest to this date to be \$241.16, and principal and interest together, the sum of \$781.59. I did accept the proposition made in the defendant's letter, to pay twenty cents on the dollar of the amount of the note, upon a sort of condition. I so wrote to him in my letter of February 5th, 1859, in answer to his letter of February 2d, 1859. I have no copy of my letter. The condition I named was, that he should pay the amount offered promptly." The plaintiff's counsel here rested the case on the part of the plaintiff. The defendant's counsel thereupon moved to dismiss the complaint, on the ground that there was not sufficient testimony in the case to relieve the plaintiff's claim from the effect of the statute of limitations pleaded by the defendant. The court denied the motion, and the defendant's counsel excepted.

The evidence being closed, the defendant claimed and insisted that, under the testimony, no cause of action was established, and that the defendant was entitled to judgment. The court refused to order judgment for the defendant; to which ruling and decision the defendant excepted. Whereupon the jury, by direction of the court, rendered a verdict for the plaintiff for the sum of \$781.59, subject to the opinion of this court at general term, upon a case to be made by the plaintiff, with liberty to the court to dismiss the complaint or to order judgment for the defendant.

A. Vanderpoel, for the defendant. I. The plaintiff did not prove "an acknowledgment or promise" sufficient to constitute "a new or continuing contract," whereby to take the case out of the operation of the statute of limitations. 1. In the first letter he refers to an intention to take the benefit of the two-third act, unless he can make a satisfactory arrangement; he proposes, as the best he can do, to pay twenty per cent on the original notes or bills. He declares that this is the best he can do, and more than he can do without help.

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He states the total of his indebtedness. This letter negatives all idea of a promise to pay even a part, unless he can arrange with all of his creditors at the rate of twenty per cent. The second letter refers to his efforts to secure a general compromise, and his determination to apply under the two-third act, if he cannot make a complete settlement in this way, and his hopes that he can get \$1000, which will not pay quite the twenty per cent; but he will try and make it up to twenty per cent, so as to make a final settlement, and hopes the plaintiff and all his creditors will consent and make a final settlement. The third letter is of no moment.

2. The code provides, that "civil actions can only be commenced within the periods prescribed in this title." (Sec. 74.) The provision of the revised statutes was substantially the same; it declared in substance that the action should be commenced within a certain time "and not after." (2 R. S. 295, § 18.) The code also provides that "no acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this title, unless the same be contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest." (Code, § 110.) Under these provisions the court of appeals, as stated by Judge Allen in giving its opinion, have established—

(1.) *That the action must be sustained upon the new promise*, though the original contract is the cause of action, and the complaint counts upon that as the ground of recovery. (2.) *That to revive or renew the debt, there must be either an express promise to pay, or an acknowledgment of its existence, from which a new promise may be implied.* (Winchell v. Hicks, 18 N. Y. Rep. 560.) And "an action brought after the lapse of six years upon a simple contract must be upon the new promise, whether the promise was before or after the lapse of six years, express or implied, absolute or conditional." (Opinion of Judge Allen, Shoemaker v. Benedict, 1 Kern. 186.) (3.) It matters not,

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therefore, that the letters relied upon were written before the statute had run against the original cause of action. They are entitled to no greater weight than if written after the statute had barred the demand. (*Tompkins v. Brown*, 1 *Denio*, 247.) (4.) The acknowledgment, when relied upon, must be such as amounts to a new contract. Judge Bronson says, "There must be a promise, *a new contract*, though founded on the original consideration, to take the case out of the statute. There must, at least, be a plain admission that the debt is due, *and that the party is willing to pay it*. It is the new promise, and not the mere acknowledgment, that revives the debt and takes it out of the statute." (*Van Keuren v. Parmelee*, 2 *Comst.* 523, 531.) (5.) While the letters may admit an indebtedness, they *expressly negative a willingness* to pay more than twenty per cent, and that only upon a condition that the percentage is accepted by all the creditors. They repel the presumption of a promise to pay the whole demand. They declare an inability to pay, and an intention, if necessary, to avoid all legal liability then existing, by resorting to the two-third act. (*Read v. Wilkinson*, 2 *Wash. C. C. Rep.* 514.)

II. An acknowledgment of a debt, accompanied by a declaration of an inability to pay, although the hope is expressed by the debtor that he may see the creditor and do something about it, has been held to be insufficient to authorize the implication of a new promise; a mere acknowledgment is not sufficient; it must show a willingness to pay. (*Hancock v. Bliss*, 7 *Wend.* 267. *Bell v. Morrison*, 1 *Peters*, 351. *Bailey v. Crane*, 21 *Pick.* 323.) In *Richardson v. Barry*, (27 *Beav.* 22,) the note is: "In a letter from the drawer to the holder of a bill of exchange, he said, 'If in funds, I would immediately pay the money and take the bill out of your hands.' Held insufficient to take the case out of the statute of limitations." In reply to a suggestion of counsel in a case involving this question, (*Hart v. Prendergast*, 14 *M. & W.* 741, 742,) Baron Parke says: "There

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must be an acknowledgment of the debt from which we may infer a promise to pay. If the defendant says in writing "I admit the debt," that is enough; but if he says "I admit the debt, but I have not made up my mind how or by what means to pay," how can you from that infer a promise to pay? (*Hart v. Prendergast*, 14 M. & W. 741.) The English statute of limitations, (*Lord Tentenden's Act*, 14 of 9 Geo. 4,) contains a section analogous to the 110th section of the code. (*Angell on Limitations*, app. 149.) The leading case in England under this section is *Tanner v. Smart*, (9 B. & C., 13 E. C. L. R. 603.) In speaking of this case in which, after reviewing all of the authorities, it was declared that unless the acknowledgment amounted to a promise to pay, it was of no effect—although it showed to a demonstration that the debt had never been paid and was still subsisting—Baron Parke says: "*Tanner v. Smart* put an end to a series of decisions which were a disgrace to the law, and I trust we shall be in no danger of falling into the same course again." (*Hart v. Prendergast*, 14 M. & W. 746.) The course of decisions referred to in these uncomplimentary terms are alluded to by Justice Bronson: "At the former period the statute amounted to little more, in judicial construction, than a ground for presuming the debt paid, which might be rebutted by the mere admission that such was not the fact. But the law is not so now." (*Van Keuren v. Parmelee*, 2 Comst. 531. *Bell v. Morrison*, 1 Peters, 351, 360.) Of the same tenor as *Tanner v. Smart* we find the cases: *Rackham v. Marriott*, (1 H. & N. 234;) *Cripps v. Davis*, (12 M. & W. 159;) *Evarts v. Robinson*, (28 Law Jour. Q. B. 23;) *Smith v. Thorne*, (18 Ad. & El. 134; 83 E. C. L. Rep.) Inserting a debt in a schedule of creditors, in insolvency proceedings, is clearly an acknowledgment of a subsisting debt, but not a promise to pay. (*Richardson v. Thomas*, 13 Gray, 381. *Brown v. Bridges*, 2 Miles Penn. Rep. 424. *Angell on Lim.* 247.)

III. Should it be suggested that the plaintiff is entitled to

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recover the twenty per cent, we answer: (1.) The question cannot be raised on this verdict and order. (2.) The offer to pay twenty per cent was conditional. "If I cannot make it a general thing, I shall try the other way." "Hoping you will consent, and all the rest of my creditors." There was no evidence that the condition was complied with. Such a promise, if relied on, can only be taken with the condition. (*Tompkins v. Brown*, 1 *Denio*, 247. *Wakeman v. Sherman*, 9 *N. Y. Rep.* 85.) (3.) The proposition was not accepted as made. It was accepted upon "a sort of condition." (4.) The agreement was without consideration. It was a promise, when made, to pay part of a sum when the plaintiff already had the defendant's promise to pay the whole sum. Until the note was outlawed, the agreement would not have prevented an action for the whole debt. As the agreement to accept in full and release, was not binding on the plaintiff, it was not binding on the defendant. (5.) The plaintiff never tendered a release or any thing which would exonerate the defendant on payment of the twenty per cent. No release or discharge was obtained from, or assented to, by any other creditor. The letters were not competent or sufficient to prove a promise, and should have been excluded. (*Bailey v. Crane*, 21 *Pick.* 323.)

IV. The letters only amounted to an offer to compromise, and were inadmissible. (*Laurence v. Hopkins*, 13 *John.* 288. *Tompkins v. Brown*, 1 *Denio*, 247.)

Geo. W. Parsons, for the plaintiff. I. The statute limiting the time for commencing actions is an arbitrary rule, designed simply to prevent suits upon stale demands, and affects only the remedy, not the debt itself. (*Waltermire v. Westover*, 4 *Kern.* 20. *Soulden v. Van Rensselaer*, 9 *Wend.* 297. *Leading English case*, *Whitcomb v. Whiting*, 2 *Doug.* 262. *Philips v. Peters*, 21 *Barb.* 358, and cases cited. *Pratt v. Huggins*, 29 *Barb.* 284. *Winchell v. Bowman*, 21 *id.* 451, *aff.* 18 *N. Y. Rep.* 558. *Shoemaker v. Benedict*, 1 *Kern.* 186.)

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II. A distinction exists between what is requisite to renew or revive a debt already barred by the statute, and an acknowledgment of the existence of the debt within the six years necessary to a continuance of an obligation. 1. This view seems to have been questioned in some of the cases, but mostly in recent ones, where the language held was mere incidental dicta used in disposing of the main question whether the acts of a partner or joint debtor could bind his co-debtor. None of those cases were like the one at bar. The reason of the distinction is well stated in Judge Denio's opinion in *Shoemaker v. Benedict*, (*supra*, p. 192.) 2. The cases of *Van Keuren v. Parmelee*, (2 Comst. 523,) and *Shoemaker v. Benedict*, are not authority for any thing except for the principle that a promise or acknowledgment made by a joint debtor, whether made before or after the statute has run, cannot bind the co-debtor. (*Philips v. Peters*, 21 Barb. 358, and cases cited.) 3. The above distinction is also preserved in *Van Keuren v. Parmelee*, (2 Comst. 523,) and *Bell v. Morrison*, (1 Peters, 352.) See also dissenting opinion of Denio, J. in *Shoemaker v. Benedict*, (*supra*, 190-194.) 4. In the one case there must be a promise, or such an acknowledgment as would create the implied promise to pay; while in the other it need only be such a recognition of the existence of the debt as to repel the presumption of payment, and show the debt to have had a recognized existence, within six years before suit brought. (*Allen v. Stevens*, 1 N. Y. Legal Obs. 359. *Winchell v. Hicks*, 18 N. Y. Rep. 558.) 5. It does not dispose of this view to say, in the language of some of the authorities, that the statute is one of repose, because the agitation and recognition of the debt within the six years is not consistent with repose. 6. The presumption of payment arising under the statute, from lapse of time, is not that payment was made at the expiration of the time fixed by statute as a bar, but at some indefinite time, or when the obligation became due. (*Martin v. Gage*, 5 Seld. 402.) And the acknowledgment

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of its existence, unpaid, before the statute could take effect, whether coupled with any evidence of a disposition to pay or not, destroys the presumption as well as the idea of repose, and continues the debt alive for six years from the date of acknowledgment. (*Cases, supra.*) 7. A promise made, or to be inferred from acts or words before the original obligation is barred, can add no force to the subsisting promise; nor could a willingness to pay manifested then, be essential to the validity of the claim. 8. What is required, to avoid the statute, is evidence within six years to rebut the presumption of payment, and to disturb the repose of an apparently stale demand. Else how could a partial payment repel the presumption of payment of the whole, or agitate the quiet of the balance.

III. But the acknowledgment of the indebtedness in this case was sufficient either to revive or continue the debt; so that it is unnecessary to insist upon the above distinction. 1. The first letter in evidence recognizes the plaintiff as a creditor; the second letter repeats the acknowledgment more specifically, and states the amount of the indebtedness; and the third continues the acknowledgment and asks further time. 2. The plaintiff was thus induced to treat these acknowledgments as continuing the obligation, or as keeping it alive, and to give the time asked for by the third letter. The defendant would not be allowed to take advantage of his own act in asking time, and that act of itself extended the time. 3. Direct and positive proof of an acknowledgment or promise, in any set form of words, is not required. It may be inferred from facts or words. (*Whitney v. Bigelow*, 4 *Pick.* 110. *Mosher v. Hubbard*, 13 *John.* 510.) 4. An acknowledgment of an indebtedness is evidence from which a promise and a willingness to pay may be inferred. (*Bloodgood v. Bruen*, 4 *Seld.* 368.) There was no qualification whatever in the acknowledgment of indebtedness in this case. 5. It was not necessary that the acknowledgment should be of any particular amount, as evidence may be, and was in

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this case, connected with the admission, and fixed the amount. (2 *Parsons on Contracts*, 349, and cases cited.) Here letter No. 2 of itself identified the amount, without the parol evidence given on the trial.

IV. Within the spirit of all the cases, these acknowledgments prevented the statute from running against the debt in question. The acknowledgment of a debt unpaid waives the protection of the statute, and repels the presumption of payment and the suggestion of repose, and continues the force of the obligation when made before the statute has taken effect, and raises an implied promise to pay the debt when made after the statute intervenes. (*Smith v. Ludlow*, 6 John. 267. *Johnson v. Beardslee*, 15 id. 3. *Martin v. Williams*, 17 id. 330. *Patterson v. Choate*, 7 Wend. 441. *Reid v. McNaughton*, 15 Barb. 168. *Frost v. Bengough*, 1 Bing. 266. *Lloyd v. Maund*, 2 T. R. 762. *Fearn v. Lewis*, 6 Bing. 173. *Mosher v. Hubbard*, 13 John. 510, *supra*. *Murray v. Coster*, 20 id. 576. *Penley v. Waterhouse*, 3 Clark's Iowa R. 418. *Brown v. Keach*, 24 Conn. R. 73. *Deloach v. Turner*, 7 Rich. (S. C.) 143. *Bullock v. Smith*, 15 Geo. R. 395. *Rich v. Dupree*, 14 id. 661. *Edmonds v. Goater*, 9 Eng. Law and Eq. R. 203.) The points established by several of the foregoing cases are briefly as follows: *Frost v. Bengough* (1 Bing. 266) was an action on a promissory note. Statute pleaded. The evidence relied on was the following letter: "Sir—Business calls me on the sudden to Liverpool. Should I be fortunate in my adventures, you may depend on seeing me in Bristol in less than three weeks; otherwise, I must arrange matters with you as circumstances will permit. I shall leave town to-morrow night." Held that it was a sufficient acknowledgment to take the note out of the statute. *Fearn v. Lewis* (6 Bing. 173) was a case which arose under what is known as Lord Tenterden's Act, 9 Geo. 4, ch. 14, being almost precisely like our own statute. There appeared to be no doubt in the minds of the court upon letters no more positive or decided than those in the

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present case, that they were sufficient to revive the debt. The defendant expressed a willingness, but a want of ability. In *Mosher v. Hubbard*, (13 *John*. 510,) the defendant did not dispute the demand, and said he did not recollect paying it, but that he would examine and write about it, but never wrote. *Held* sufficient to take the case out of the statute, and to imply a promise to pay, if not paid. In *Murray v. Coster*, (20 *John*. 576, *affirming* 5 *id.* 522,) the defendant's answer admitted that, to avoid litigation, they had offered to pay the plaintiffs, but at the same time insisted that they were discharged by length of time from all liability, and expressly reserved their right to avail themselves of the statute of limitations, in case the offer of settlement was refused. *Held* that this was such an acknowledgment of the debt as defeated the operation of the statute. In *Penley v. Waterhouse*, (3 *Clark's Iowa R.* 418,) it was held that a promise or acknowledgment, to take the debt out of the statute, may be made before as well as after the debt is barred. From that acknowledgment the law implies a promise. Expressions of an inability to pay will not defeat such acknowledgment. In *Brown v. Keach*, (24 *Conn. R.* 73,) the plaintiff wrote a letter to the defendant, speaking of the indebtedness. The answer was: "Yours of the 24th has been received, and in reply I hardly know what to say; but as you request an answer soon, I will say in return that I can't tell you what I can do at present, but I have been thinking of coming to W—— for some time, but will omit it till I hear from you again. I wish you, by return of mail, to send me a true copy of all the claims that you hold against me in full dates; that is, I want it word for word, and indorsement, etc. and I will either see you or write soon." *Held* sufficient to remove the bar. *Deloach v. Turner* (7 *Rich. S. C.* 144) holds that a slight acknowledgment of the debt before the statute has run, will take a case out of the statute. (*Rich v. Dupree* (14 *Geo. R.* 661) decides that when a new promise to pay a debt is made before the old promise is barred, the statute

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begins to run again from the date of the new promise. *Edmonds v. Goater*, (9 *Eng. Law and Eq. R.* 203.) Upon an application for payment of £450 due upon two bills of exchange, dated March 25, 1836, upon which interest had been paid up to the 25th March, 1841, a letter was written by the debtor on the 13th of January, 1846, stating: "I hope to be in H—— very soon, when I trust every thing will be arranged with Mrs. W—— agreeable to her wishes." *Held* that this was a sufficient promise to pay to take the debt out of the statute.

LEONARD, J. The acknowledgment need not express any intention to pay. An intention to pay is to be presumed. It is of very little consequence what was the intention of the debtor in this respect. If he acknowledges the existence of the debt, in writing, the provisions of the law are met, and the statute of limitations has not attached. In the absence of proof that other demands existed to which the acknowledgment of the defendant might apply, the presumption is that it applied to the demand proven. (*Davenport v. Gilbert*, 6 *Bosw.* 180.) The evidence adduced removed the uncertainty or doubt, if any existed, and was in my opinion admissible.

There is nothing in *Winchell v. Hicks* (18 *N. Y. Rep.* 560) adverse to a recovery in this case.

The plaintiff is entitled to judgment, with costs.

CLERKE, J. The chief difficulty which first occurred to me in this case was the want of an explicit acknowledgment, specifying the debt. But I find in the second letter of the defendant, in a postscript, a sufficient identification of the debt. He says the amount of the plaintiff's debt, at 20 per cent, would be \$108.09 cash. On referring to the note we find it to be \$540.42, which at 20 per cent would be the amount mentioned.

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I think therefore this was a sufficient acknowledgment, and that the plaintiff is entitled to judgment, with costs.

SUTHERLAND, J. (dissenting.) The provision of the code is, that "no acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this title, unless the same be contained in some writing signed by the party to be charged thereby," &c. Now, although it is certainly to be inferred, from the letters written by the defendant to the plaintiff, that he was indebted to the plaintiff in a certain amount, yet the note in suit is not mentioned in either of the letters; nor is there any thing in either of the letters to show what evidence of indebtedness the plaintiff had against the defendant. The *letters* do not specify or refer to the claim of the plaintiff, so that you can tell from them whether the plaintiff held the defendant's note, bill or even any written contract. The plaintiff, for the purpose of giving effect to the letters as a written acknowledgment of his debt, thought it necessary, or at least prudent, to show by parol evidence, that the note in suit was the only debt or demand he had against the defendant, and that the letters referred to it. Now, could these letters be made effective as a written acknowledgment, by parol evidence? I must confess, I have serious doubts whether they could. Would it not tend to defeat what we must suppose to have been the intention and policy of the requirement of the law, to hold that the writing can be assisted by parol, to the extent required, to make the letters a *written* acknowledgment in this case? (*See Wright v. Weeks*, 25 N. Y. R. 153.)

But I do not think it is necessary to decide the case upon the point which has been suggested. If the note in suit had been mentioned and described in the letters, they would not have saved it, I think, from the operation of the statute of limitations.

In *Winchell v. Hicks* (18 N. Y. Rep. 560) it is said to be settled, "1st. That the action must be sustained on the new

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promise, although the original contract is the cause of action, and the complaint counts upon that as the ground of recovery. 2d. That to revive or renew the debt, there must be either an express promise to pay, *or an acknowledgment of its existence, from which a new promise may be implied.*"

Certainly the acknowledgment must be such that an intention to pay can be inferred from it; or at least such an acknowledgment as is consistent with an intention to pay. Now all you can infer from the defendant's letters is, that he has been thinking of taking the two-third act, but had rather compromise with his creditors by paying them 20 per cent; that he probably could borrow the money to pay 20 per cent of all his debts, and he offers to the plaintiff 20 per cent. Even this offer I understand to be conditional, that is, on condition that his creditors, or his creditors generally, agree to take 20 per cent. How can a promise or intention to pay the plaintiff's debt be implied from these letters, when the defendant offers to pay 20 per cent only, and that offer is conditional? It is rather to be inferred from the letters that the defendant did not intend in any event to pay more than 20 per cent, and that his willingness or intention to pay the 20 per cent depended upon all his creditors, or his creditors generally, consenting to take 20 per cent.

In my opinion there is no ground for the distinction suggested by the counsel for the plaintiff, between an acknowledgment or promise made after the debt has been barred by the statute of limitations, and an acknowledgment or promise made before the statute has attached. No such distinction is made in the provision of the code, and such a distinction is repudiated in several cases. (*Shoemaker v. Benedict*, 1 Kern. 186. *Tompkins v. Brown*, 1 Denio, 247. *Dean v. Hewit*, 5 Wend. 257.) There should be judgment for the defendant, and that the complaint be dismissed with costs.

Judgment for plaintiff.

[NEW YORK GENERAL TERM, May 2, 1864. *Leonard, Clarke and Sutherland, Justices.*]

BUTTS *vs.* PERKINS.

In October, 1855, H. being indebted to P. in the sum of \$26.50 for a set of tomb-stones, arranged with S., a debtor of his, that S. should pay that sum to P. upon delivery of the stones. But P. being indebted to the plaintiff upon a promissory note dated January 30, 1854, payable one day after date, P. agreed with the plaintiff that the latter might receive from S. the price of the stones, and apply the amount thereof upon the note, and P. thereupon delivered the stones to the plaintiff for S., who had previously consented that the parties might make this arrangement, and had notice that it was made, and assented to it soon after it was made. *Held* that the effect of the transaction was to substitute S. in the place of P. as debtor to the plaintiff, for the price of the stones, and that it operated *in presenti*, as a payment of such price, upon the note.

Held also, that the agreement canceled \$26.50 of P.'s indebtedness on the note, as of the date of the delivery of the stones, and that the plaintiff should have indorsed that sum on the note, as of that date, although he did not receive the same from S. until April 1, 1856.

And that as the \$26.50 ought to have been paid by S. and received by the plaintiff, at the time of the delivery of the stones, the payment of that amount upon the note—so far as the question of the statute of limitations was concerned—should be considered as made and received at that time.

ACTION on a promissory note; defense, a general denial and the statute of limitations. The evidence was uncontradicted. The referee found the following facts and conclusions of law: First. That on the 30th day of January, 1854, the defendant, for value received, executed and delivered to the plaintiff a promissory note, of which the following is a copy:

“\$300. One day from date, I promise to pay Harvey Butts, or bearer, three hundred dollars, with interest.

Laurens, Jan. 30, 1854.

JOHN F. PERKINS.”

Second. That said plaintiff then became, ever since has been, and still is the holder and owner of said note.

Third. That an indorsement was placed upon said note by the plaintiff, on the 1st day of April, 1856, of \$26.50, of which the following is a copy, to wit:

“Received, April 1, 1856, of Samuel Straight, twenty-six dollars and fifty cents, to apply on interest on the within note.”

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Fourth. That said indorsement was placed upon said note under the following circumstances and agreement, to wit: About the month of April, 1855, one Abel Harrington had made an agreement with the defendant by which the defendant was to manufacture a set of tomb-stones for the grave of Harrington's deceased wife; for which Harrington was to pay the defendant \$26.50; the stones to be paid for when taken away from the defendant's shop, which was in Oneonta, Otsego county; that the defendant manufactured said stones and had them ready for delivery at his shop in the month of October, 1855; that previous to said last date, Harrington had sold some cattle to Straight, and that an agreement was made between Harrington and Straight, by which Straight was to pay the defendant the price of said tomb-stones for Harrington, and Harrington was to credit Straight the amount thereof, as a payment upon said demand against Straight for the cattle; that the plaintiff and Straight both resided in Laurens in said county; that in October, 1855, the plaintiff was about going to Oneonta, and Straight informed him that there was a set of tomb-stones at the defendant's shop for the grave of Harrington's deceased wife, and that by agreement between him and Harrington, he, Straight, was to pay for them; and Straight requested the plaintiff to call at the defendant's shop and bring them up. An agreement was then made between the plaintiff and Straight, by which, if the defendant would consent, the price of said stones was to be applied on the said note of the plaintiff, and Straight was to pay the price thereof to the plaintiff instead of paying it to the defendant; that the plaintiff, in said month of October, 1855, called at the defendant's shop in Oneonta and took said stones into his wagon, and the plaintiff and defendant made an agreement that the price of said stones, \$26.50, should be applied on the said note, and that Straight might pay said price to the plaintiff instead of paying to the defendant; that when Straight paid the same to the plaintiff the plaintiff was to indorse it on the note, and that the plaintiff was to notify

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Straight that he was to pay the said price to him. That the plaintiff took said stones to Straight and notified him of the above agreement between the plaintiff and defendant, on the same day, or within a day or two after making said agreement; that Straight then owed the plaintiff some other demands; that the plaintiff did not request payment for the stones; that Straight did not request the plaintiff to wait or extend the time of payment, and that the price of said stones so remained until the 1st day of April, 1856, on which day Straight paid the price of them, \$26.50, to the plaintiff, who immediately and on the same day indorsed the same on the note; that the defendant was not present when said indorsement was made, and knew nothing of it, and that he had nothing to do with the demand for the stones after October, 1855, and that he never called upon Straight or Harrington for the price of said stones.

Fifth. That the price of said stones was due in October, 1855, when they were taken from the defendant's shop by the plaintiff.

Sixth. That this action was commenced on the 31st day of March, 1862.

Seventh. That said note had been due more than six years before this action was commenced.

As matter of law, the referee found, *First*. That the \$26.50, the price of the stones, should have been applied on the note in October, 1855, when they were taken from the defendant, the price being due then; that the action should have been brought within six years from that time; that the payment by Straight and the indorsement by the plaintiff, made on the 1st day of April, 1856, did not take the note out of the operation of the provisions of the code of procedure concerning the time of commencing civil actions.

Second. That this note was, before the commencement of this action, barred by the limitations of the above statute, and that the plaintiff could not recover in this action.

Third That the defendant was entitled to judgment for

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costs; and judgment was ordered accordingly. To all of which the defendants excepted.

After judgment was entered in favor of the defendant for \$63.46 costs, the plaintiff appealed therefrom to the general term of the court.

L. L. Bundy, for the plaintiff, cited *Read v. Hurd*, (7 *Wend.* 408;) *Roseboom v. Billington*, (17 *John.* 184;) *Winchell v. Hicks*, (18 *N. Y. Rep.* 558;) *Barger v. Durvin*, (22 *Barb.* 68;) *Allen v. Webster*, (15 *Wend.* 284;) *Stafford v. Richardson*, (*Id.* 302;) *Shoemaker v. Benedict*, (1 *Ker.* 185.)

Sturges & Countryman, for the defendant, cited *Angell on Limitations*, 250, § 241; *Roseboom v. Billington*, (17 *John.* 182;) *Stafford v. Richardson*, (15 *Wend.* 302; *Id.* 306, 7;) *Shoemaker v. Benedict*, (1 *Ker.* 183;) *Van Keuren v. Parmelee*, (2 *N. Y. Rep.* 523;) *Dunham v. Dodge*, (10 *Barb.* 566;) *Winchell v. Hicks*, (18 *N. Y. Rep.* 558;) *Read v. Hurd*, (7 *Wend.* 408;) *Pickett v. King*, (34 *Barb.* 193;) *Davis v. Spencer*, (24 *N. Y. Rep.* 386;) *Gardiner v. Callender*, (12 *Pick.* 374.)

By the Court, BALCOM, J. Straight was to pay the defendant \$26.50 for the tomb-stones upon delivery at his shop. But as the defendant was indebted to the plaintiff upon the note in question, he agreed with the latter that he might receive pay of Straight for the stones, and apply the amount thereof upon the note, and the defendant then delivered the stones to the plaintiff. Straight had previously consented that the parties might make this agreement, and had notice that it was made, and assented to it when the plaintiff took the stones to him, which was within a day or two after such agreement was made. It bound him as well as the parties to the action, for Harrington had paid him for the stones. All this occurred in October, 1855, which was more than six years prior to the time the action was commenced.

The effect of the transaction was to substitute Straight in place of the defendant, as debtor to the plaintiff, for the price of the stones, and it operated *in presenti* as a payment of such price upon the note. (*See Davis v. Spencer*, 24 N. Y. Rep. 386; *Gardner v. Callender*, 12 Pick. 374; *Eaves v. Henderson*, 17 Wend. 190; *Read v. Hurd*, 7 id. 408.)

The plaintiff could have maintained an action against Straight for the price of the stones. (*See Barker v. Bucklin*, 2 Denio, 45; 4 id. 97; *Lawrence v. Fox*, 20 N. Y. Rep. 268.)

He could not have avoided applying such price upon the note, even if he had failed to collect it of Straight.

It was immaterial to the defendant whether the plaintiff could or should collect the price of the stones of Straight. He parted with the possession of the stones in part payment of his note, and as he delivered them to the plaintiff upon a new agreement with him, he parted with all right of action therefor against Straight or Harrington.

There was a sufficient consideration for this agreement, moving from the defendant; for the presumption is that he would not have delivered the stones to Straight or Harrington without being paid down for them.

Suppose the plaintiff had sued the defendant upon the note the next day after the stones were delivered, he could not have avoided allowing the price of the stones as a payment upon the note on the ground that Straight had not paid the same to him. He would have been told that the price of the stones was due from Straight to him and not to the defendant.

Straight was not in any sense the agent of the defendant in paying for the stones to the plaintiff; nor was the latter in any sense his agent in collecting such pay of Straight. Both acted as principals, and were principals in the transaction, after the agreement was made that entitled the plaintiff to the price of the stones from Straight, and bound the latter to pay it to the former.

The agreement canceled \$26.50 of the defendant's indebtedness on the note as of the date of the delivery of the stones,

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and the plaintiff should have indorsed the \$26.50 on the note as of that date, though he did not receive the same of Straight until the first day of April in the following year. (*See authorities cited, supra.*)

No reason has been assigned for the delay of the plaintiff in collecting the price of the stones of Straight; and for aught that the case shows, there was no good reason for such delay. Straight was able to pay for the stones, and he did not request the plaintiff to wait or extend the time of payment. Hence if there had not been such a consideration moving from the defendant, as to shift the risk from him to the plaintiff, of Straight paying for the stones, it would have been the duty of the plaintiff to collect pay for the stones of Straight at the time he delivered them, or to have refused to deliver them unless paid therefor; and in that case the reasoning of Sutherland, J. in *Read v. Hurd*, (*supra*,) would apply. He there said: "It does not appear whether the price of the steer was to have been paid immediately by Skiff, or whether the sale was upon credit. If no credit was given, it may admit of very serious question whether, as between the plaintiff and the defendant, the payment must not be considered (so far as the question of the statute of limitations is concerned) as made when, by the terms of the agreement between Skiff and Read, it ought to have been made. If not, then it was in the power of Skiff at any period, no matter how remote, to have revived this note, by a payment to the plaintiff."

If this reasoning is sound, and we continue the supposition that the risk of Straight paying for the stones remained with the defendant, it is clear that it was the plaintiff's duty to require Straight to pay for the stones when he delivered them to him, or to Harrington for him; and as the price ought then to have been paid by Straight and received by the plaintiff, it should be considered (so far as the statute of limitations is concerned) as made and received at that time. If not, then it was in the power of Straight to revive the note

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in question, at any time, however remote, by the payment of the price of the stones to the plaintiff.

My conclusion is that the defendant cannot be regarded as consenting to the indorsement or application upon the note of the \$26.50 as of the 1st day of April, 1856, when the same was paid by Straight to the plaintiff; and that such sum must be deemed to have been paid and should be applied upon the note as paid by the defendant in October, 1855, which was more than six years prior to the time the action was commenced.

The judgment should therefore be affirmed, with costs.

Decision accordingly.

[BROOME GENERAL TERM, May 10, 1864. *Campbell, Parker, Mason and Balcom*, Justices.]

THE PEOPLE, *ex. rel.* I. S. Marshall, vs. JESSE McKINNEY.

The act of April 12, 1856, (*Laws of 1856, p. 285.*) relative to common schools, required the board of supervisors of the several counties to meet on the 3d day of June in that year, and elect a school commissioner, for each assembly district, who should hold his office until January 1, 1858. Section 7 directed that at the general election to be held in 1857, "and every three years thereafter," there should be elected a school commissioner for each assembly district, who should enter into office on the 1st of January, 1858, and should hold office for three years and until his successor should have qualified &c. Section 9 authorized any commissioner to resign his office, and for the appointment by the county judge of a successor to fill the office till the next general election thereafter. A vacancy occurring in the office of school commissioner in Chemung county, in September, 1862, by the resignation of the incumbent, whose term of office would have expired on the 31st of December, 1863, M. was appointed by the county judge, to fill the vacancy. At the general election in November, 1862, McK. was duly elected to that office, without any thing in the notice of election to show that it was to fill a vacancy; and he immediately entered upon the duties of the office. At the general election in November, 1863, M. was elected to the said office, and on the 1st day of January, 1864, claimed to hold the same, and to enter upon the duties thereof, while McK. claimed still to hold the office.

Held, 1. That the appointment of M., in September, 1862, to fill a vacancy, only entitled him to hold the office till the general election in November thereafter.

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2. That the vacancy in the office, occurring in September, 1862, did not change the time of electing the commissioner, so that one was not thereafter to be elected "every three years," dating from the general election in 1857.
3. That section 9 of the statute should be construed as relating exclusively to vacancies, and the filling of them; and that there was no incongruity between it and section 7.
4. That McK.'s election in 1862 must be deemed to have been only for the vacancy, and that his term of office commenced at the date of such election, and expired on the last day of December, 1863; and that M. was duly elected at the general election in 1863, for the term of three years, commencing on the 1st day of January, 1864, and was entitled to the office, with the fees and emoluments from that time.

THIS case was agreed upon and submitted to the general term for decision. The facts are as follows: At the general election in November, 1860, James McMillen was duly elected school commissioner of the county of Chemung, under the act of the legislature, (chapter 179 of the laws of 1856.) In the month of September, 1862, McMillen resigned such office, and thereupon the above named Isaac S. Marshall was duly appointed by the county judge of said county to fill the vacancy thereby caused in said office. At the general election in November, 1862, the above named Jesse McKinney was duly elected to said office; due notice having been given of such election, without any thing in the notice to show that it was to fill a vacancy; and under such election, he immediately, on the 15th day of November, 1862, entered upon the duties of said office, and still claims to hold the same, and continues to act as said school commissioner.

At the general election in 1863, due notice having been given by the secretary of state that a school commissioner for Chemung county was to be chosen at such election, and the said McKinney and said Marshall having been respectively nominated for the office of school commissioner of said county, both entered into a canvass for said office and solicited the election thereto, and received the following votes for such office, viz: Isaac S. Marshall received 2807 votes, and Jesse McKinney received 2703 votes, and they alone were

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voted for at said election for said office. Marshall received his certificate of election to said office and took the oath of office, and on the first day of January, 1864, claimed to hold the office and to enter upon the duties thereof.

The question submitted to the court was, whether McKinney, under the constitution and laws of the state, was entitled to hold said office of school commissioner for a longer period than up to the first day of January, 1864, and also whether he or the relator, Isaac S. Marshall, is entitled to the said office.

H. B. Smith, for the relator.

E. P. Hart, for the defendant.

By the Court, BALCOM, J. The act of 1856 (*Laws of 1856*, p. 285) required the board of supervisors to meet on the 3d day of June in that year, and elect a county officer "to be called school commissioner," who should hold his office until the first day of January, 1858.

It was provided, among other things, by section seven of the act referred to, that at the annual general election held in the year one thousand eight hundred and fifty-seven, "*and every three years thereafter*," there shall be elected, on a separate ballot to be endorsed "school commissioner," in the several assembly districts, a school commissioner for each district. That the persons so elected shall enter into office on the first day of January one thousand eight hundred and fifty-eight, "and shall hold office for three years and until their successors shall have qualified according to law."

Section nine of such act is as follows: "Any commissioner may at any time resign his office to the clerk of the county in which he was elected, and in case of vacancy from such cause, or by death, removal from office or from the county, or refusal to accept, the county clerk shall give immediate notice to the county judge of said county, who shall appoint

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a successor to fill such vacancy till the next following general election, when a successor shall be chosen by the electors as hereinbefore provided."

Chemung county is one assembly district.

The appointment of Marshall in September, 1862, to fill a vacancy only entitled him to hold the office of school commissioner till the general election in November of that year. The question therefore is, whether the election of McKinney, at that election, entitles him to hold the office three years from the time he was elected, or three years commencing on the first day of January, 1863; or only entitled him to hold the office during the unexpired term of McMillen, whose resignation first caused the vacancy in September, 1862.

If McMillen had not resigned, his term of office would have expired on the 31st day of December, 1863; and in that case there could have been no doubt that it would have been proper and legal to elect a school commissioner at the general election in that year, who should hold office three years, commencing on the first day of January, 1864.

Did the vacancy in the office of school commissioner in September, 1862, change the time of electing such officer, so that one was not thereafter to be elected "every three years," dating from the general election in 1857? I am of the opinion it did not.

All difficulty on the subject vanishes by construing section nine of the act referred to as relating exclusively to vacancies and the filling of vacancies; and I think this is the obvious meaning of the section.

The vacancy caused in September, 1862, could not be filled by appointment longer than till the first day of the next January thereafter, by reason of a constitutional inhibition, (*Con. art. 10, sec. 5*.) even if the legislature had attempted to authorize it.

The legislature only authorized the filling of a vacancy in the office, by appointment "till the next following general election;" for the reason that they provided for *then* filling

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it by the electors. And it is obvious if they had intended that a school commissioner should *then* be elected *for the term of three years*, they would have declared that the person so elected should enter upon the duties of his office on the first day of January thereafter, and that the person previously appointed to fill the vacancy should hold the office until that day; and they did neither. This omission has a plain significance, and shows that section nine must be construed to relate exclusively to vacancies and the filling of them. For unless it be so construed a school commissioner, elected by the people at the next general election after the happening of a vacancy, must hold the office only three years *from such election*, and not three years commencing on the first day of January thereafter.

A person elected by the people pursuant to section nine, to fill a vacancy, is chosen by the electors as previously provided in the act, when he is voted for on a separate ballot, indorsed "school commissioner," and the votes are received and counted in the manner prescribed by section seven.

If these views are correct, there is no incongruity between sections seven and nine; and the elections for full terms, provided for by the act of 1856, go on harmoniously, once in every three years, dating from the general election in 1857.

My conclusion is that McKinney's election in 1862 must be deemed to have been only for the vacancy, and that his term of office, under that election, commenced at the date of such election, and expired on the last day of December, 1863; and that the relator, Marshall, was duly elected at the general election in 1863 for the term of three years, commencing on the first day of January, 1864; and consequently that he is entitled to the office and all the profits and emoluments thereof, commencing on the last mentioned day; and that he should have judgment therefor, with costs.

Decision accordingly.

[BROOME GENERAL TERM, May 10, 1864. *Campbell, Parker, Mason and Balcom, Justices.*]

DIVEN, receiver &c., vs. DUNCAN and others.

A proceeding under the act of 1849, "to enforce the responsibilities of stockholders," &c. (*Laws of 1849, p. 343*), is not barred by a previous judgment recovered in an action instituted under the revised statutes, (2 R. S. 463, §§ 39, 40,) by a stockholder of the bank, to compel the application of its assets to the payment of its debts.

In a proceeding under the act of 1849 to enforce the individual liability of the stockholders of an insolvent bank, for the payment of its debts remaining after its assets are exhausted, executors are properly chargeable as holders of stock which appears on the books of the bank to have been held originally by their testator, and subsequently by them.

If a stockholder is living, and a resident of the county in which the notice to stockholders is published, at the time the publication commences, his death afterwards will not abate the proceedings, or render the publication ineffectual.

ON the 21st of September, 1857, the Yates County Bank, a safety fund institution, having stopped payment, Peter S. Oliver, a stockholder, commenced an action by summons and complaint, in this court, against the said corporation, under the provisions of the revised statutes, for an injunction, the appointment of a receiver, and to wind up its affairs. On the 22d of September, 1857, this court, at a general term, granted the injunction prayed for, and appointed Alexander S. Diven, the plaintiff in this suit, receiver of the property and effects of the bank. Final judgment was rendered and perfected in that action, according to the prayer of the complaint, on the 15th of October, 1857.

Afterwards, and on the 9th of November, 1857, under the act of 1849, entitled "An act to enforce the responsibilities of stockholders" &c., passed April 5, 1849, (*Laws of 1849, p. 343*), the plaintiff was duly appointed receiver of the bank, and soon thereafter took into his possession and under his control the assets of the bank. On the 7th of September, 1861, the plaintiff, as such receiver, presented to the Hon. Henry Welles, one of the justices of this court, an account and report, pursuant to the 14th section of the act, containing an account of the debts and liabilities of the bank remaining unpaid, together with a list and statement of the

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persons who, since the 1st of January, 1850, were stockholders, as required by the 15th section. Judge Welles thereupon made an order appointing Samuel H. Welles referee, and referring the said report and list of stockholders to him, with directions to apportion the debts &c. among the stockholders, as required by section 16. The referee, having notified the stockholders of the time and place of meeting, proceeded with the reference and made and signed his report, charging the stockholders with the debts of the bank. This was a motion to confirm the report, and for judgment.

D. B. Prosser, for the plaintiff.

H. O. Chesebro, for the defendants.

JAMES C. SMITH, J. Various objections are made to a confirmation of the report of the referee in this proceeding; some upon grounds common to all the stockholders, and others relating only to the particular case of the party objecting. The former class will be first considered.

The objection that this proceeding is barred by the judgment recovered in the action commenced by Peter S. Oliver, against the bank, is unsound. The action referred to is an essentially different remedy from this proceeding. It was instituted under the revised statutes, (2 R. S. 463, §§ 39, 40,) by a stockholder of the bank, to compel the application of its assets to the payment of its debts; while this proceeding is brought under the provisions of an act passed in 1849, (*Laws*, ch. 226,) to enforce the individual liability of the stockholders of the bank for the payment of its debts remaining *after its assets are exhausted*, which liability was created by the constitution of 1846, and by the very terms of the act can be enforced in *no other manner* than that prescribed by the act itself. (§ 1.) Besides, it does not appear that the plaintiff in this proceeding ever acted under his appointment as receiver in the action commenced by Mr. Oliver. On the other hand, it appears that under his appointment in this

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proceeding, which was made subsequently to the last step shown to have been taken in that suit, he entered upon his duties as receiver, took possession of the property of the bank, and disposed of it as required by the act. It further appears that Mr. Oliver was employed by him, and acted throughout as his managing clerk, in the performance of those duties. The assets of the bank having been thus disposed of by the receiver in this proceeding, in the mode required by the act, with the active concurrence of the plaintiff in the action, and without objection by the stockholders, so far as appears, I do not see upon what principle the action can now be interposed as a bar to the further prosecution of this proceeding by the receiver to enforce a liability on the part of the stockholders which could not have been enforced in the action.

The constitutional questions raised by the stockholders have been decided adversely to their views. (*In the matter of Oliver Lee & Co.'s Bank*, 21 N. Y. Rep. 9; *S. C. in Supr. Court of U. S. Matter of the Empire City Bank*, 18 N. Y. Rep. 199. *In the matter of the Reciprocity Bank*, 22 *id.* 9.)

The objections taken to the report of the receiver, on which the justice acted in making the order of reference, are not available to the stockholders for the purpose of defeating this application. The only object of the report was to inform the court that the affairs of the bank presented a case within its general jurisdiction of proceedings against the stockholders of banks of issue, to charge them with the unpaid debts of such banks. The order of reference was the beginning of litigation as to the stockholders. They were not parties to the previous proceedings of the receiver, nor in any respect concluded by them. They had an opportunity, before the referee, to contest all the matters required by the act to be alleged in the report of the receiver, (*per Denio, J. in the matter of the Empire City Bank, supra*, pp. 208, 209, 211 to 214,) and having availed themselves of such opportunity, they cannot now object that the report was insufficient.

The same reasoning applies to the position taken by the

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objectors, that it appears affirmatively from the testimony taken before the referee that no proper legal evidence of the claims against the bank, allowed by the receiver, was presented to that officer, and therefore, that they were not "established" by him in any legal sense. His action in that respect is not conclusive upon the stockholders, as they may litigate all claims before the referee; and the allegations in his report, in respect to the amount of the debts of the bank, and the evidence on which he based his conclusions, were sufficient to authorize the order of reference. Even if it were competent now to inquire into the evidence on which he acted, it would be found sufficient. It consisted of entries in the books of the bank, and they are competent *prima facie* evidence, as against the stockholders. The same evidence was produced before the referee, and warrants his report in respect to the amount of debts, to wit, that the debts remaining unpaid, for which the stockholders are individually liable, exceed in amount the whole capital stock.

It is objected that the power of the court to order a reference in this proceeding was exhausted by its order to that effect of 2d May, 1860, under which a hearing was commenced before the referee, but not brought to a conclusion, and which order has not been vacated. The second order of reference made while the first was in force, may have been irregular, but it was not absolutely void. It was in the power of the court, on good cause shown, to vacate the first order, at any time before the referee had completely executed it, and upon a proper application, to make another order of the same nature. It was admitted before the referee that after the decision of the court of appeals in the matter of the Reciprocity Bank (*supra*) the stockholders took the objection, upon the hearing under the first order, that the assets of the bank had not been exhausted, and the counsel for the receiver thereupon withdrew his papers from the referee. For aught that appears, this step was taken by him without any objection by the stockholders, and no further action was had

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under that order by either party. The proceedings under that order may therefore be regarded as having been discontinued by common consent, for the reason that the order was made before the assets of the bank had been exhausted, and, of course no valid action could be had under it. If a formal order had been entered in accordance with that arrangement of the parties, there would have been no ground for claiming even an irregularity in the subsequent proceedings, and if the omission to enter such order were material, it clearly would be in the power of the court to remedy it by an order *nunc pro tunc*, discontinuing the proceedings before the referee and vacating the order appointing him. But a mere irregularity in that report cannot be taken advantage of at this stage of the proceeding.

It remains to consider the second class of objections.

I think the objectors, Curtis and Jones, as surviving executors of Daniel S. Marsh, are properly chargeable as the holders of the twenty shares of stock which appear on the books of the bank, to have been held originally by their testator, and subsequently by his executors. Not that they are to be regarded as "equitable owners," within the meaning of the second section of the act, but having the legal title to the stock, they are liable under the first section. Besides, the pecuniary liability which would have rested upon the testator, if he were now living, may be enforced against his estate, and primarily against his personal property, the legal title of which is in them.

For similar reasons the administrators of Andrew F. Oliver are liable in their representative character.

I am also of the opinion that Mrs. Rankin is properly charged, as the executrix of the will of her husband, upon the stock in her hands. Her case is substantially like that of the executors of Marsh, except that it is claimed in her behalf that she was not served with notice of the hearing before the referee. Her husband was living when the order of reference was made, and as service of the notice could

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properly be made on him by publication, he being a resident of the county of Ontario, his name was inserted in the notice, which was first published on the 12th of September. I do not think it can be successfully claimed that his death, on the 26th day of the same month, abated the proceeding or rendered the publication ineffectual. Such a construction would often greatly retard and embarrass, if not wholly defeat, the object of the statute, in cases where the stockholders are numerous. In view of the summary nature of the proceeding, and the provisions of the act dispensing with personal service as to stockholders residing out of the county in which the bank was located, I think the notice was sufficient. (18 *N. Y. Rep.* 214 to 217.)

The report of the referee should be confirmed and judgment ordered accordingly.

[YATES SPECIAL TERM, October 21, 1862. *J. C. Smith*, Justice. Affirmed at the MONROE GENERAL TERM, December, 7 1863. *E. D. Smith*, *Johnson* and *J. C. Smith*, Justices.]

 CHARTER and others vs. OTIS.

A testator, by his will which took effect previous to the revised statutes, devised as follows: "As touching such worldly estate wherewith it hath pleased God to bless me in this life, I give, demise and dispose of the same in the following manner and form: first, I give and bequeath to H. my dearly beloved wife, sixty-six acres of land of the farm I now occupy, beginning at the east end, and running south, together," &c. "for her benefit and disposal as she shall necessarily want. I likewise give and bequeath to M. N., my son, ninety-four acres of land, it being part of the before mentioned farm, beginning on the west side of the land willed to his mother, running westwardly; likewise a certain tract or parcel of land lying, &c. containing thirty-two acres and a half, deeded to me by E. S., together with my personal property that is not disposed of otherwise, &c.; likewise to E. C. one young cow; and furthermore my honest debts to be paid."

Held that the testator intended to devise the ninety-four acres to M. N. in fee, and that his intention to do so was legally perceptible upon the face of the will.

Held, also, that the will being unambiguous, accurate and correct in respect to the location and identity of the lands devised, the person intended as

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devisee &c., parol evidence of extrinsic facts, such as that the country was a wilderness and the lands devised were wild and uncultivated, was inadmissible.

Held, further, that evidence of the declarations of the testator, to show that a prior conveyance by him of a part of the same land to his daughter E. whose children were the plaintiffs, was a gift to her, was also properly excluded.

Although the introductory clause of a will, declaring the testator's intention to dispose of *all* his "*estate*" does not, of itself, enlarge a particular devise to a fee, yet it is very material to the inquiry concerning the purpose of the testator in relation to the *quantum* of the estate devised.

It is a key to the intention of the testator; and if it shows that he intended to part with his whole interest, the subsequent words will, if possible, be so construed as to pass an estate in fee, to prevent intestacy as to any part of his property.

APPEAL from a judgment entered upon the report of a referee. The action was ejectment, brought to recover the possession of an undivided third of forty-seven acres of land, part of a farm situate in the town of Brighton, in the county of Monroe, of which one Joel Northrop died seised, in the year 1805. Northrop left a will, the material portions of which are as follows: "As touching such worldly estate wherewith it hath pleased God to bless me in this life, I give, demise and dispose of the same in the following manner and form: first, I give and bequeath to Hannah, my dearly beloved wife, sixty-six acres of land of the farm I now occupy, beginning at the east end, and running south, together with her household furniture, and one cow and four sheep, for her benefit and disposal as she shall necessarily want. I likewise give and bequeath to Miles Northrop, my son, ninety-four acres of land, it being a part of the before mentioned farm, beginning on the west side of the land willed to his mother, running westwardly; likewise a certain tract or parcel of land lying on Genesee river, containing thirty-two acres and a half, deeded to me by Enos Stone, together with my personal property that is not disposed of otherwise; likewise to Eunice Charter, my daughter, one young cow; and furthermore my honest debts to be paid."

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The testator, by his will, appointed executors, and revoked all former wills. The testator left him surviving two children, viz. Miles Northrop and Eunice Charter. Miles Northrop died in 1854. Eunice Charter died intestate prior to 1830, leaving nine children, her heirs at law, of whom the plaintiffs are six. The plaintiffs claimed, as part of the heirs of Joel Northrop, that the devise to Miles Northrop gave him only a life estate; and that he having died, the heirs of the testator were now entitled to the fee. The defendant was in possession of the premises described in the complaint, being forty-six acres of the farm of one hundred and sixty acres mentioned in the will, at the time of the commencement of this action, under the heirs of Miles Northrop; and he claimed that the devise to Miles passed a fee. He also claimed that the premises in question were a portion of the ninety-four acres of the testator's farm mentioned in the will and devised to said Miles Northrop. On the trial the defendant introduced evidence to show how the farm of one hundred and sixty acres had been divided into two parcels of ninety-four acres and sixty-six acres, respectively, giving the lines and corners of said farm and said division, and to show the occupation by Hannah Northrop, the widow of Joel Northrop, and by Miles Northrop, of parcels of ninety-four acres and of sixty-six acres, respectively, according to such division, claiming under said will; such occupation having been from the time of the death of Joel Northrop. The defendant then offered to prove by Leonard Perrin that at the time of the death of Joel Northrop the country where the lands devised were situated was a wilderness, new and unimproved, with but occasional settlers; and that the two parcels of land claimed by the defendant to have been devised to Miles Northrop were wild and uncultivated. The plaintiffs objected to this proof, and it was excluded by the referee. It was proved, on the part of the defendant, that at the time of making his will, and at the time of his death, the testator resided on the southeast corner of the farm of one hundred

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and sixty acres, and what was claimed by the defendant to be the sixty-six acres devised to the testator's wife, having moved there in 1800; that his daughter, Eunice Charter, was married and resided upon fifty acres of land, next west of the said one hundred and sixty acre farm, the said fifty acres having been deeded to her by the said Joel Northrop in April, 1805. The defendant then offered to prove by a witness that after having given said deed to his daughter, Northrop said that he had given the same to her as gift. This evidence was objected to, and excluded.

The referee found that Miles Northrop took only a life estate in the ninety-four acres; that the devise of the ninety-four acres to him was valid and operative, and that the land could be located. And he decided that the plaintiffs were seised in fee of the equal undivided one-third part of the premises described in the complaint, and were entitled to recover the possession thereof. The defendant excepted to the report, and appealed from the judgment.

J. L. Angle, for the appellant.

George G. Munger, for the respondents.

By the Court, JAMES C. SMITH, J. The first question to be decided is whether under the will of Joseph Northrop, set out in the case, his son, Miles Northrop, took an estate in fee simple in the ninety-four acres of land devised to him, or only an estate for life. As the will took effect before the revised statutes, and the particular devise in question contains no words of perpetuity, it does not of itself convey a fee, and the question is therefore one of intention, to be collected from the whole will. I have referred to the numerous cases cited upon the argument, but I find none so similar to this, in all respects, as to control it, although many of them state and illustrate various general principles or rules of construction which bear upon the question, and by which, so far as they

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are applicable, I intend to be guided. An attentive examination of the will, in the light of the authorities referred to, and of the principles recognized by them, has satisfied me, not only that the testator in fact intended to devise the lands in question to his son, in fee, but that his intention to do so is legally perceptible upon the face of the instrument.

In the first place, the introductory clause expressly declares the testator's intention to dispose of *all* his "*estate*." Although this declaration does not, of itself, enlarge the devise in question to a fee, yet it is very material to the inquiry concerning the purpose of the testator in relation to the *quantum* of the estate devised, (17 *Wend.* 398;) it is a key to the intention of the testator, (2 *Preston on Estates*, 206;) and as it shows that he intended to part with his whole interest, the subsequent words will, if possible, be construed so as to pass an estate in fee, to prevent intestacy as to any part of his property. (*Per Thompson, J. in Jackson v. Merrill*, 6 *John.* 191.) In view of this rule of interpretation, which is firmly established by English as well as American authorities, it might well be supposed that the subsequent words of disposition which the testator used in connection with the land in question were employed by him for the very purpose of executing, in respect to such land, the intention declared by him in the introduction; that is, to convey his *whole* interest therein. The case of *Doe v. Harter*, (7 *Blackf. Ind. Rep.* 448,) was decided upon this precise ground, as appears by the brief and sensible opinion of the court, delivered by Justice Blackford. "The will," he says, "has an introductory clause as follows: 'As to such *worldly estate* as it has pleased God to intrust me with, I dispose of *the same* in the following manner,' &c. There is also this clause: 'And to effectuate this my intention, I bequeath,' &c. (Here follows a bequest to his wife of a support on the plantation, and of specific personal property, and then, by a distinct clause, the gift to his son, which will be presently quoted, and in respect to which the question arose.) The judge proceeds: "The

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introductory clause clearly shows, by the use of the word 'estate,' the testator's intention to devise the fee. It is well settled that by the word 'estate,' in a will, when descriptive of the testator's interest in the land, and he has a fee in it, a fee passes. (*Doe dem. Lean v. Lean*, 1 *Adol. & Ellis*, 229.) But it is admitted that the introductory clause would not, of itself, be sufficient to convey the fee; there must be something to show that the intention was carried out. The intention is carried out in the present will by what follows, to wit: 'And to effectuate this my intention, I bequeath, &c. * * * and I also will and bequeath that Preston Franklin, my son, shall have the eighty acres of land whereon I now live,' &c. We think the introductory clause, and the words of the devise, are here connected together, and that the devise, which, taken by itself, is only for life, is when considered with the introductory clause with which it is united, a devise in fee." This case is in all substantial respects the same as the case at bar. The sole difference between them is one of unimportant verbiage, for it is just as apparent that the testator Northrop employed the words of disposition in his will, "to effectuate" the intention declared in the introductory clause, as if he had said so in express terms. But I think the case of *Doe v. Harter* goes further than any other in the books, and I am not disposed to reverse the judgment below upon its authority alone, especially as the case at bar presents many additional circumstances leading to that result.

1. There is in Northrop's will a residuary clause as to the personal estate, but none as to the real property. This circumstance in connection with an introductory clause like the one before us, has been regarded as very important in many reported cases. In *Frogmorton v. Holyday*, (3 *Burr.* 1618,) a testatrix, after declaring in the introductory clause of her will, an intention to dispose of her "worldly affairs and estate," made several specific devises and bequests, and among them a devise of lands to her son John, without words of perpetuity, and afterwards disposed of the residue of her personal

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property only. Lord Mansfield, in his opinion, said, "She has declared that she did not mean to die intestate as to *any part* of her real estate. She has specifically named *each* part of it; and her sweeping residuary clause does not mention her *real* estate. Therefore she thought she had fully disposed of *that* before, and consequently she meant this devise to her son John to be a devise *in fee*." Justice Wilmot concurred in this reasoning, and the court unanimously gave judgment in accordance with it. The case also presented some other circumstances in aid of the intention, but the residuary clause was evidently considered as important as any. The reasoning of Lord Mansfield in that case, upon this question, was referred to with approbation in *Denn v. Allaire*, (*Spencer's N. J. Rep.* 6,) and *Robinson v. Adams*, (4 *Dall.* 12, 21;) and the same argument was used by Lord Kenyon and Justice Grose in *Lane v. Stanhope*, (6 *T. R.* 353,) and by Justices Johnson and Patterson in *Lambert v. Paine*, (3 *Cranch*, 97.) We were not referred, on the argument, to any reported case in which the reasoning of Lord Mansfield above stated has been dissented from. The respondent's counsel cited two cases in our own state holding that the absence of a devise of the reversionary interest will not turn the life estate into a fee; (*Harvey v. Olmsted*, 1 *Comst.* 483; *Van Derzee v. Van Derzee*, 30 *Barb.* 331;) but in those cases there was no residuary clause, either of real or personal property, and of course no ground for the application of the reasoning which prevailed in *Frogmorton v. Holyday*.

2. The devise of *land* to Miles Northrop is coupled with a gift of *personal* property in the same clause; and the same words are used in disposing of each species of property. This shows that the testator meant to give the *same* estate in the real property as in the personal, that is, an absolute estate. This construction is sustained by the cases of *Roe v. Pattison*, (16 *East*, 221;) *Doe v. Roberts*, (11 *Ad. & El.* 1000;) *Packard v. Packard*, (16 *Pick.* 191;) *Morrison v. Semple*, (6 *Binn.* 94;) and *Johnson v. Morton*, (10 *Barr*, 245.) The

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same argument is advanced or referred to approvingly by the Lord Keeper Somers in *Richardson v. Bergavenny*, (2 Vern. 325;) by Lord Mansfield in *Rose v. Hill*, (3 Burr. 1881, 1884;) by Justices Tucker and Fleming in *Johnson v. Johnson*, (1 Munf. Va. Rep. 549;) by Chief Justice Gibson, in *Weidman v. Marsh*, (16 Penn. Rep. 511;) and by Justice Story, in *Wright v. Denn*, (10 Wheat. 76.)

But it is suggested by the respondent's counsel that in the cases in which this rule was adopted, the two classes of gifts were accompanied with expressions referrible, and intended to refer, to both, and which were sufficiently comprehensive of themselves to carry the fee in the real estate devised, such as "property," "estate," "moiety," or the like; and that the question turned on the force of such expressions. It is true that such expressions are to be found in some of the cases cited, but I do not understand that the decision turned upon them; indeed, if that had been the case, it is manifest that the circumstance of the gift of an absolute estate in personal property in the same clause with the devise, would have been wholly unimportant, as the fee would have passed without it; yet that circumstance is adverted to and relied upon specially, in all the cases, and *solely*, in some of them.

We are also reminded that the language of many judges and text writers is directly opposed to the proposition above stated. (2 *Jarm. on Wills*, 4th Am. ed. 125, notes.) But the *dicta* to that effect (for no adjudication upon the point is cited) are all based upon the authority of cases in which the limitation of "dying without issue" was annexed to a *mixed* devise, and the question was whether that limitation should receive the same construction in respect to both kinds of property. That question is by no means identical with this, and however closely analogous the two may be, the authorities relating to the former are, as is well known by all lawyers, directly in conflict with each other. (*Forth v. Chapman*, 1 P. Wms. 667. *Porter v. Bradley*, 3 T. R. 145. *Fosdick v. Carnell*, 1 John. 440. *Jackson v. Staats*, 11 id. 337. *An-*

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derson v. Jackson, 16 *id.* 382. *Patterson v. Ellis*, 11 *Wend.* 259. *Newton v. Griffith*, 1 *Harr. & Gill*, 111. *Edelen v. Middleton*, 9 *Gill*, 162.)

It can hardly be maintained as claimed by the respondent's counsel, that such a devise simply tends to illustrate the private intention of the testator, and that the objection still remains, "*voluit non dixit.*" The testator has used express words of disposition, in respect to both species of property, and if the estate given in the personal property is the measure of the estate given in the lands, he has devised the latter absolutely, or in fee, as effectually as if he had used technical words of perpetuity. A legal intention, legally expressed, is enough. "Any words denoting the entire interest in the thing devised, will pass a fee, as well as the word 'estate.'" (*Per Burrough, J. in Pocock v. The Bishop of Lincoln*, 3 *Brod. & Bing.* 26, 27. 7 *E. C. L. R.* 335, 339.) In the forcible language of Chief Justice Wilmot, "Let a testator use what words or expressions he will, if they disclose what he means, it is the law to his family, and must be obeyed; and the indulgence which the law shows to this kind of instrument, is owing partly to the act of parliament which enables persons to devise at their will and pleasure, and partly in respect of the situation which men are in when they make their wills, incapable of getting advice; and therefore the law delivers them from the vassalage of form and technical words, and only expects that their meaning should be told in writing." (*Baddeley v. Leffingwell*, *Wilmot's Notes*, 233.)

3. The devise of a life estate to Miles, leaving him to take a share of the same land as *heir*, is not a probable intention, under any circumstances, (31 *Penn. Rep.* 76,) and especially in view of the language of the introductory clause, and of the rule of construction, which, as we have seen, results from it.

4. The widow had not only a fee in the lands devised to her, but also a life estate, (her dower,) in the lands devised to Miles, (7 *Cowen*, 287; 2 *John. Ch.* 448,) so that if he took but a life estate, it was subject to the life estate of his mother.

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This circumstance, alone, would be entitled to but little weight, as it was of course competent for the testator to limit successive life estates upon the same property. But as he has not done so in express terms, and as there are many other indications that he did not intend to do so, I think this circumstance not unimportant. In *Gall v. Esdail*, (8 Bing. 323; 21 *E. C. L. R.* 307,) Chief Justice Tindal specially adverted to a similar feature in the will then before him, as evidence of an intention to devise a fee, and said, "The plaintiff's construction would confer interests so complicated as are not likely to have occurred to any testator."

5. It is apparent from the frame and verbiage of the will that the testator was not acquainted with the technical form of a devise of lands in fee, and the law presumes him to have been *inops consilii*.

From these circumstances it seems to me clear that the testator devised the lands in question to his son, in fee simple.

As this conclusion leads to a reversal of the judgment, I might here properly dismiss the case, but for the fact that some important questions of evidence remain, upon which the views of the court ought to be made known, before the case goes back for a new trial.

The first question of that nature is presented by the defendant's exception to the ruling of the referee excluding parol evidence offered by the defendant to show that "the country in which the land devised was situated, was a wilderness, new and unimproved, with but occasional settlers, and that the lands devised were wild and uncultivated." In the examination of this question, the following considerations must be borne in mind. (1.) The only point in litigation, and of course the only one in respect to which the evidence offered is admissible, if at all, is the *quantum* of the estate devised. There is no question of location of the lands, or of identity, either as to the lands devised, the person intended as devisee, or any other essential subject connected with the gift. In all these respects the language of the will is unam-

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ambiguous, accurate and correct. (2.) The offer must be deemed to assume that an intention to devise a fee is not clearly manifested by the language of the will, unaided by extrinsic facts; otherwise the evidence is unnecessary, and for that reason was properly excluded. The evidence is therefore offered for the purpose of introducing into the will an intention to devise an estate in respect to which the will is silent—namely, the estate in *remainder* after the life estate of Miles Northrop. (3.) If it is not clear upon the face of the will that the testator intended to devise an estate in fee, the law peremptorily settles the question in favor of the *heir*.

A bare statement of these propositions would seem to demonstrate the correctness of the ruling of the referee upon the question before him; but there are authorities to be found, some of which were cited upon the argument, apparently leading to a different conclusion. It becomes necessary, therefore, to examine them.

The appellant's counsel claims that the proposed testimony is admissible upon the general principle laid down by Mr. Wigram, in his treatise on "the admission of extrinsic evidence in aid of the interpretation of wills," and constituting his "fifth proposition," (page 51.) "The fourth example" stated by him under that proposition presents more particularly the special ground relied upon by the appellant's counsel, and is in these words: "The legitimate effect of circumstantial evidence, in cases in which the *quantity of interest* given by the will is the point in dispute, is not, perhaps, so well defined as in the cases which have already been stated, [i. e. cases in which the *person* or *thing* intended was the point of contention, or the description in the will was *incorrect*.] The proposition, however, that such evidence is admissible, where the question of interest is the point in dispute, is certain." Upon a casual reading of the language which I have here transcribed, it may seem to warrant the reception of the evidence offered in this case; but after a careful consideration of the author's proposition and of the cases cited by him in

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its support, I am satisfied that it was not intended to assert that extrinsic evidence is admissible in circumstances such as exist in this case, to convert an apparent devise for life into a devise in fee; or, if the proposition was intended to be thus broad, it is not, to that extent, supported by authority.

The first case cited by the author as an adjudication upon the question involved in his proposition, is that of *Lowe v. Ld. Huntingtower*, (4 Russ. 532, n., 581.) But in that case the words of the will were clearly sufficient, *of themselves*, to pass to the plaintiff an estate in fee simple, and upon a case ordered by the vice chancellor, the judges of the court of king's bench had so certified; but afterwards, on the application of the defendants, extrinsic facts were introduced into the case, and were held to be admissible as evidence, for the purpose of showing that the testator did *not intend* to devise to the plaintiff an estate in fee. In the subsequent important case of *Miller v. Travers*, (8 Bing. 244; 21 E. C. L. R. 288,) in which Lord Chief Justice Tindal of the court of common pleas, and Lord Lyndhurst, chief baron of the court of exchequer, were called on to assist the lord chancellor, the chief justice, in delivering their joint opinion, adverted to the case of *Lowe v. Ld. Huntingtower*, and remarked that the evidence of collateral circumstances was there admitted, "not to introduce new words into the will itself, but merely to give a construction to the words used in the will consistent with the real state of the testator's property and family; the evidence," he said, "is produced to prove facts which, according to the language of Ld. Coke, in 8 Rep. 155, *stand well* with the words of the will." This distinction is also forcibly illustrated by the case of *Miller v. Travers* itself. There, was a devise of all the testator's freehold and real estate in the county of Limerick and city of Limerick. The testator had no estates in the county of Limerick; he had a small estate in the city of Limerick inadequate to meet the charges laid upon it in the will; and estates in the county of Clare not mentioned in the will. It was held that the devisee could not be allow-

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ed to show, by parol evidence, that the testator intended his estates in Clare to pass under the same devise. It was assumed by the chief justice that if parol evidence was admissible by law, the evidence tendered in the case would be sufficient to establish, beyond contradiction, the alleged intention of the testator; "yet still," said he, "as the devise in question has a *certain operation and effect*, namely, the effect of passing the estate in the city of Limerick, and as the intention of the testator to devise any estate in the county of Clare cannot be collected from the will itself, nor without *altering or adding* to the words used in the will, such intention cannot be supplied by the evidence proposed to be given." The process of reasoning by which this result was reached is sufficiently shown by the following brief extracts from the elaborate and instructive opinion of the chief justice. "The plaintiff contends that he has a right to prove that the testator intended to pass not only the estate in the city of Limerick, but an estate in a county not named in the will. * * * But this, it is manifest, is not merely calling in the aid of extrinsic evidence to apply the intention of the testator, as it is to be collected from the will itself, to the existing state of his property; it is calling in extrinsic evidence to *introduce into the will* an intention not apparent on the face of the will. It is not simply removing a difficulty, arising from a defective or mistaken description; it is making the will speak upon a subject on which it is altogether silent, and is the same, in effect, as the filling up a blank which the testator might have left in his will. It amounts, in short, by the admission of parol evidence, to the making of a new devise for the testator, which he is supposed to have omitted." (P. 291.) "Neither of the cases cited afford any authority in favor of the plaintiff; they decide only that where there is a sufficient description in the will to ascertain the thing devised, a part of the description which is inaccurate may be rejected, *not that any thing may be added to the will*; thus following the rule laid down by Anderson, C. J. in *Godb. Rep.* 131. "An averment to take

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away surplusage is good, but not to increase that which is defective in the will of the testator." (P. 293.) It is apparent from the foregoing extracts, that the doctrine of the case of *Lowe v. Lord Huntingtower*, as recognized in *Miller v. Travers*, is merely this: that evidence of collateral circumstances is admissible to give to the words used in a will a construction consistent with the state of the testator's property and family, but in cases where a certain estate is devised by the will such evidence is not admissible for the purpose of giving to the devisee a greater estate, or a larger *quantum* of interest than is devised by the words of the will.

The case of *Gall v. Esdaile*, (8 Bing. 323; 21 E. C. L. R. 305,) also cited by Mr. Wigram, came before the court on a *special case*. No question of the *admissibility of evidence* was, or could have been decided by the court, as they passed upon the facts which the parties spread upon the record. Besides, there were clear grounds upon the face of the will for the judgment which the court rendered, without looking at the collateral facts. It is not to be supposed that the learned chief justice (Tindal) who took part in the decision, intended to reverse the rule so clearly and forcibly laid down by him a short time before, in *Miller v. Travers*.

The only other case cited by Mr. Wigram, is that of *Pocock v. The Bishop of Lincoln*, (3 Brod. & Bing. 27; 7 E. C. L. R. 335;) and it is referred to by him, not as an authority expressly in point, but with the remark that "the arguments of the court * * * fully recognize the particular point" insisted on by him. The case came before the court on a demurrer to the plea, in which the defendant had alleged that at the time of the devise to him by the testator, his father, in 1795, of "the perpetual advowson of Husbands Bosworth," he was *incumbent of the living*, having been presented to it by his father in 1790; whence it was argued in his behalf that unless the fee passed, he could derive no benefit from the devise, and thence an intention was to be inferred to devise a fee; but the court thought that as devisee he had a very dif-

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ferent interest in the advowson from that which he had before as the mere incumbent, and held that the devise gave only an estate for life. Of course there was no question as to the admissibility of evidence, and all that is claimed from the case by Mr. Wigram is that "if no state of circumstances could have been suggested, in which the devisee could *possibly* have been benefited by the devise, without departing from the strict and primary sense of the testator's words, the court must, in favor of the testator's intention, have accommodated their meaning to the circumstances of the case, by analogy," says the author, "to the cases referred to under the first and second examples, and upon the *same* principle." The cases here referred to are those in which either the *person* or *thing* intended by the testator is the point of contention, (1st *Ex. p.* 53,) or the description in the will is *incorrect*, (2d *Ex. id.*) and the governing principle referred to is that "where the circumstances of the case make it *impossible* that the words of the will could have been used by the testator in their strict and primary sense, a popular or secondary sense may be put upon them, and extrinsic evidence must be admissible, or a court would be without the means of judging in what popular or secondary sense (if any) the testator may have used the words." (*P.* 52.) Keeping in mind this principle, and the analogy suggested, we can see clearly the nature and extent of the rule which the author intended to assert. It is simply an application to the subject of extrinsic evidence in aid of the interpretation of wills of the presumption of law that every devise is intended for the benefit of the devisee; and it admits extrinsic evidence to show that a gift of an estate for life could not possibly have benefited the person to whom it was devised. It is analogous to the rule that a charge upon the devisee carries a fee by implication. The limits and propriety of the rule are illustrated by the case of *Rose v. Rawlinson*, (3 *Bro. P. C.* 7.) There, A. devised to B., her son, all her right, title and interest in a certain messuage called "The Bell Tavern," but without adding any words of inher-

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itance. It appeared by extrinsic evidence, that before the devise, the message was settled upon A. for life, remainder to B. in tail, remainder to A. in fee; and it was *held* that by the devise the fee passed, for if B. took no more by the will than an estate for life, he had really nothing given him, because he had *more than an estate for life* in it before. It is true this case came before the court upon a special verdict, and the question was not presented as one of evidence strictly, but on the argument it was urged, in opposition to the very ground on which the judgment proceeded, "that to pass lands by a will, there must be sufficient words, in writing, to dispose of the estate, without regarding things *foreign to the will itself*; for if there be not words, the estate remains undevised, and is left to the disposition of law:" but the position was overruled. The cases of *Standen v. Standen*, (2 Ves. jun. 589; *Selwood v. Mildmay*, (3 *id.* 306;) and *Day v. Trigg*, (1 P. Wms. 286,) were decided upon principles analogous to that of *Rose v. Rawlinson*. (See comments of *Tindal*, Ch. J. upon these cases, in *Miller v. Travers*, pp. 292, 3.)

The testimony offered by the defendants in the case at bar, does not come up to this rule. It is manifest that the devise to Miles Northrop, of a life estate in the lands in question, even assuming them to have been wild and uncultivated, was beneficial to him. He had no estate in the land before the devise; he was not by the will subjected to any charge respecting it; and it cannot be affirmed that the life estate was absolutely of no value. By the law of our state, a tenant for life, of wild lands, may undoubtedly fell part of the timber, so as to fit the land for cultivation, as well as take reasonable estovers. (*Kidd v. Dennison*, 6 Barb. 9, and cases there cited by *Paige, J.*)

I am not aware of any case, in this state or in England, in which evidence similar to that which was offered in this case has been held admissible, or in which a devise of wild and uncultivated land, without words of perpetuity, or equivalent words, has been held to pass the fee. In support of

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both these positions, however, the counsel for the defendants has referred us to the following cases in other states of the union: *Sargent v. Town*, (10 *Mass.* 305;) *Ridgway v. Carter*, (*Id.* note;) *Caldwell v. Fergusson*, (2 *Yeates*, 250;) *Russell v. Elden*, (3 *Shep.* [15 *Maine.*] 193;) *Holmes v. Patterson*, (25 *Penn.* [1 *Casey.*] 485;) and *Lummis v. Mitchell*, (34 *N. H. Rep.* 39.) I have examined them all, and although they contain expressions of opinion respecting the positions which they are cited to sustain, I do not think any of them, except the case of *Sargent v. Town*, can be regarded as an adjudication upon the point in question, and the decision in that case is the result of argumentation, which, for reasons already stated, seems to me unsound.

I think the testimony was properly excluded.

It follows from the foregoing reasoning that the referee also properly excluded the evidence tendered, of the declarations of the testator, to show that the prior conveyance by the testator of a part of the same lot to his daughter Eunice, whose children are plaintiffs in this action, was a gift to her.

For the reasons above stated in respect to the construction of the words of the will, the judgment should be reversed, and a new trial ordered.

[MONROE GENERAL TERM, December 1, 1862. *Johnson, J. C. Smith and Waller*, Justices.]

OVIATT vs. HUGHES and others.

On the 15th of September, 1855, a manufacturing corporation, by resolution, appointed K. its general agent and attorney, agreeing to pay him a salary of \$1000 a year, to commence on the first day of that month, besides expenses; but no time was fixed when the salary was to become due and payable. *Held* that the company did not contract a *debt* within the meaning of section 12 of the act of February 17, 1848, authorizing the formation of corporations for manufacturing and other purposes, for the salary of K. when they adopted that resolution. Nor did they contract

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a debt for his services from day to day, or month to month, as they were rendered; the statute speaking of "debts" existing or contracted, not of *liabilities* which may ultimately ripen into debts.

That K. was to be paid a price agreed upon, *by the year*, for his services; and there being no express stipulation as to the time when he was to be paid, he was not entitled to pay, by the terms of the resolution, until the expiration of a year from the time when the salary was to commence. But that the time of payment might be changed by a subsequent agreement terminating the employment and allowing K. compensation at the rate of \$1000 a year, for the time already elapsed.

Held, also, that the expenses of K., incidental to the business, were put upon the same footing, as his salary, in respect to the time when they could be considered a debt against the company. And that upon the failure of the trustees to make the report required by the 12th section of the act of February, 1848, the corporation was to be deemed indebted to K. only for such expenses as he had paid or incurred up to that time.

THIS action was brought to recover of the defendants personally a certain debt due from the Rochester Iron Works to Rufus Keeler, and by him assigned to the plaintiff, on the ground that the defendants as trustees of said company did not file or publish the report required to be filed and published by the 12th section of the act to incorporate manufacturing companies, (*Laws of 1848, p. 57; 2 R. S. 5th ed. p. 661.*) of which this is one, in the year 1857. The company was organized July 20, 1854, for the purpose of manufacturing Hughes' Atmospheric Trip Hammer, and disposing of the same in the United States and in foreign countries. Keeler was one of the original trustees, and president of the company. The original capital of the company was \$5000. This was afterwards and prior to January 1, 1856, increased to \$100,000, by the purchase of Mr. Hughes' right. In September, 1855, Keeler was employed by the company as its general agent and attorney, at a salary of \$1000 per year and his expenses. In the fall of 1855 he went to Europe on the business of the company, to wit, to make sale of hammers and to obtain patents from certain of the European governments; and while so absent he incurred expenses on account of the company, which, together with his salary, amounted

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to \$1879.34. The account was at last settled, after allowing payments, at \$800. In July, 1856, Keeler resigned as president and trustee. In September, 1857, he assigned his claim to the plaintiff, who brought suit against the company, and on the 3d of January, 1860, recovered judgment. On the trial of the present action there was evidence given to show that Hughes, one of the defendants, was one of the trustees of the company; also evidence tending to show that he was not. As to the other defendants, there was no question that they were. It was admitted by the answer that the report required by law was not filed within the first 20 days of January, 1857. The defendant moved for a nonsuit, which was granted. Exceptions were taken by the plaintiff, on the trial, which were ordered to be heard in the first instance at a general term.

Wm. F. Cogswell, for the plaintiff.

George G. Munger, for the defendants.

JAMES C. SMITH, J. This action is brought against the defendants as trustees of the Rochester Iron Works, a corporation organized under the act authorizing the formation of corporations for manufacturing and other purposes, passed 17th February, 1848. The object of the action is to enforce a liability imposed by the twelfth section of the act, which provides that every company organized under the provisions of said act shall annually, within twenty days from the first day of January, make a report as prescribed in said section, "and if any of said companies shall fail so to do, all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made." (*Laws of 1848, ch. 40, p. 57, § 12.*)

The claim which the plaintiff seeks to recover was assigned to him by Rufus Keeler, and is for services rendered and ex-

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penses incurred by Keeler in the employment of the company. Keeler was one of the trustees of the company from the time of its organization in 1854, to 28th July, 1856, when he resigned. The plaintiff claims that the defendants are liable on account of a default which occurred in January, 1857, after Keeler ceased to be trustee.

The defendants insist, however, that the claim which the plaintiff seeks to recover, was an existing debt of the company when the default occurred in 1856, or was contracted during its continuance. If this position were warranted by the evidence, the plaintiff could not recover, inasmuch as the official term of his assignor covered the period of that default, and he was responsible therefor equally with his associates; but I think the position above stated cannot be maintained.

In the first place it is to be observed that the default which happened in January, 1856, ceased on the fourth day of February, in that year, on which day the trustees made and filed a report. (*Id.* § 12. 17 *N. Y. Rep.* 458, 466.) The defendants claimed upon the argument that the report referred to was not made by a majority of the trustees, and therefore was a nullity. The printed case does not show whether the report was signed by *any one*, nor that any point in respect to the want of signatures was raised at the trial. But the case does show that the report was duly verified by the oaths of the president and secretary, the former of whom was required by law to sign it, and that it was filed. In these circumstances, I think it is fairly to be inferred that the original report produced at the trial was properly signed.

It is to be noticed in the next place, that Keeler acted under a resolution of the company, adopted 15th September, 1855, appointing him the general agent and attorney of the company, by the terms of which resolution he was to receive a salary of \$1000 a year for his services, besides expenses; the salary to commence 1st September, 1855, but no time was fixed *when it was to become due* and payable. The services

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were rendered during a period of eight months, commencing some time in the fall of 1855, and the expenses were incurred from 14th November, 1855, to 17th May, 1856, inclusive. On 19th May, 1856, the directors appointed a committee to audit his accounts and report; on 28th July, 1856, his resignation of the offices of president and trustee was tendered and accepted; on the next day the committee audited his account at \$800, after deducting a payment of \$1000, which appears to have been previously made, but at what particular time is not stated, and allowing an item of \$666.66 "for eight months' services, as per resolution." On 5th August, 1856, the committee reported their action to the board, and the bill was audited and ordered to be passed to Mr. Keeler. In rendering the services above mentioned, Mr. Keeler went to England, in the fall of 1855, and returned about the middle of May, 1856.

I do not think the company contracted a *debt*, within the meaning of the 12th section of the act above referred to, for the salary of Mr. Keeler as their agent, when they adopted the resolution appointing him such agent, nor that they contracted a debt for such services from day to day, or month to month, as they were rendered. The statute speaks of "debts" existing, or contracted, not of *liabilities* which may ultimately ripen into debts. Keeler was to be paid a price agreed upon, *by the year*, for his services; and as there was no express stipulation as to the time when he was to be paid, I think he was not entitled to pay, by the terms of the resolution, until the expiration of a year from the time when his salary was to commence. There would therefore have been no "debt" against the company, on account of his salary, until he had rendered a year's services, but for the modification of the contract in July, 1856, terminating the employment by mutual consent, and allowing him compensation for the eight months' services theretofore rendered, *at the rate* of \$1000 a year. (12 *John*. 165. 13 *id.* 53. 17 *New York Rep.* 465.)

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I am also inclined to think that the expenses of the agent "incidental to the business" are, by the terms of the resolution under which he acted, put upon the same footing as his compensation for services, in respect to the time when they could be considered a debt against the company; but however that may be, it is clear that on the 4th day of February, 1856, the company was indebted only for such expenses as the agent had paid or incurred previously to that time. The amount of his expenses at that date does not distinctly appear, but the defendants' counsel estimated it on the argument at 25/60 of the expenses of the trip to Europe, or \$505.28. Assuming the estimate to be correct, the remainder of the claim, amounting to \$1294.72, was not a debt against the company until after the 4th of February, 1856. Assuming also the correctness of the defendants' position, that the payment of \$1000 should be applied first to that portion of the claim not affected by the default of the plaintiff's assignor, a point which in the view I take of the case it is not necessary to decide, and upon which I do not express an opinion, there would still remain a balance which the plaintiff was entitled to recover.

I am of the opinion that the other grounds upon which the defendants moved for a nonsuit are also untenable, and as it is understood that the judge at the circuit so regarded them, I have not deemed it necessary to state the reasons which lead to this conclusion.

If these views are correct, there should be a new trial.

WELLES, J. concurred.

JOHNSON, J. dissented.

New trial ordered; costs to abide event.

[MONROE GENERAL TERM, December 1, 1862. *Johnson, J. C. Smith and Welles*, Justices.]

PECK *vs.* YORKS and others.

Section 324 of the code applies as well to injunction orders as to other orders. The special provision made by section 225 is in addition to the powers conferred by section 324, and is not a substitute for them.

Hence, a judge of this court, or a county judge, has power, on an *ex parte* application, to vacate or modify an injunction order made by himself, without notice.

But this power is not to be used under all circumstances, without regard to the rights of parties to be affected thereby; nor should it be left to each judge to determine for himself under what circumstances he will exercise it.

A judge should never vacate or modify an injunction order, without notice, except when, from the urgency of the case, it is necessary to guard against serious loss which sometimes may be occasioned by the delay incident to serving notice.

Where the application to modify an injunction order was not made till more than a year had elapsed after service of the injunction upon the defendants, or some of them, and not till after all of them, except one, had appeared and answered, it was held that an *ex parte* order modifying the injunction, without notice, was improvidently granted.

A PPEAL from an order made at a special term. This was a creditor's suit, brought against Anthony Yorks, the judgment debtor, Theodore D. Yorks, Zimri Cook, and others, to set aside a transfer of the property of Anthony Yorks to the other defendants, on the ground of fraud. The action was commenced in November, 1861, and an injunction order was granted on the 22d day of that month by the county judge of Livingston county. This injunction order was served on all the defendants, between the 10th day of December, 1861, and the 21st day of January, 1862, all of whom, except Cook, appeared and put in their answers. On the 29th of December, 1862, and after proceedings had been commenced by the plaintiff against Anthony Yorks and Theodore D. Yorks, for violating the injunction order, the defendants, without notice to the plaintiff, applied to the county judge for, and obtained from him, a modification of the injunction order. The plaintiff, at a special term, moved to set aside the order of modification. The special term held that it was improper for the county judge to grant the order

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ex parte, and directed his order to be set aside, (see 24 *How. Pr. Rep.* 363, *S. C.*) and the defendants appealed.

G. F. Danforth, for the appellants.

G. E. Ripsom, for the respondent.

By the Court, JAMES C. SMITH, J. The appellants' counsel is right in his position that section 324 of the code applies as well to injunction orders as to other orders. The special provision made by section 225 is in addition to the powers conferred by section 324, and not a substitute for them. This was expressly held by the court in the third district, at general term, in the case of *Bruce v. The Delaware and Hudson Canal Company*, (8 *How. Pr. Rep.* 440,) and we concur. It follows from this ruling that a judge of this court, or a county judge, has power, on an *ex parte* application, to vacate or modify an injunction order made by himself, without notice.

But it does not follow that such power may be used under all circumstances, without regard to the equitable rights of parties to be affected thereby, or that it should be left to each judge in the state to determine for himself under what circumstances he will exercise it. The practice respecting it should, as far as practicable, be uniform and consistent with equity; and to accomplish those ends it may be regulated by the court. I assent to the opinion expressed in *Bruce v. The Delaware and Hudson Canal Company*, (*supra*), that a judge should never vacate or modify an injunction order, without notice, "except when, from the urgency of the case, it is necessary to guard against serious loss, which sometimes may be occasioned by the delay incident to serving notice." This I have no doubt is the intent of the statute.

In the case under consideration nothing of the nature above stated was made to appear to the judge, and the application was not made till more than a year had elapsed after service

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of the injunction upon the defendants or some of them, and not till after all of them, except Cook, had appeared and answered.

Under these circumstances, the order modifying the injunction without notice was improvidently granted, and the special term properly directed that it be set aside for that reason, and that the original injunction order be reinstated, with leave to the defendants to apply to the court, on motion, for such modification as may be just.

The order of the special term should be affirmed, with costs.

[MONROE GENERAL TERM, June 2, 1863. *E. Darwin Smith, Johnson and James C. Smith*, Justices.]

PECK vs. COOK, impleaded with others.

Upon an application for an order that the service of a summons may be made by publication, pursuant to the provisions of section 185 of the code, the applicant must not only show that the case falls within some one of the five subdivisions of that section, but he must also establish the jurisdictional fact that the person on whom the service of the summons is to be made cannot, *after due diligence, be found* within the state.

The circumstance that such person is a non-resident is of no importance, except as it tends to establish the fact that he is not within the state at the time when the application is made.

If the affidavit upon which an order for publication is granted is insufficient, the plaintiff will not be aided by the fact that after the order for publication was made, the summons and complaint were served upon the defendant, personally, out of this state.

APPEAL from an order made at a special term setting aside an order made by George Hastings, county judge of Livingston county, for the service of the summons in this case upon the defendant Cook by publication. The application for the order was made upon the following affidavit of the plaintiff, viz: "J. Franklin Peck, being duly sworn, says that he is the plaintiff in this action, which is in the nature of a creditor's suit, and is brought for the purpose of reach-

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ing the property of the said defendant Anthony Yorks, which cannot be done by execution, the said action having been commenced by filing the plaintiff's summons and complaint, with an injunction granted therein, in the office of the clerk of Livingston county, on or about the 27th day of November, 1861; and that the same was served upon the defendants, Anthony Yorks and Howell Mosher, on the 10th day of December, 1861; on the said defendant John Mosher on the 12th day of said December, and on the said defendant Theodore Yorks, on the 4th day of January, 1862. And this deponent further says that the said defendant Zimri Cook is not a resident of this state, though he frequently visits the county of Livingston, but his residence is in the township of York, county of Medina and state of Ohio; that deponent placed a copy of said summons, complaint and injunction in this action in the hands of a deputy sheriff of the county of Livingston, with directions to serve the same on said Cook, on or about the 25th day of November, 1861; but this deponent is informed by said deputy that with all diligence he has been unable to find said Cook, and deponent verily believes that it will be impossible to obtain due service upon said Cook in this state. And this deponent further says that the said defendant Zimri Cook pretends to own and hold a valuable house and lot in Lima, which the said defendant Anthony Yorks has occupied for many years past, and to which he formerly held the title. And this deponent, upon information and belief, avers that said Cook is not really the owner of said property, but that the same is held for the benefit of the said Anthony Yorks; and deponent seeks among other things to recover the same by this action."

Upon this affidavit the county judge made an order reciting that it appeared to his satisfaction that a cause of action existed against Cook, in equity, and that service of the summons and complaint upon him could not be obtained in this state, and directing that the summons be served on him by the publication thereof once in each week for six weeks, in

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the newspaper printed in the county of Livingston called the "Livingston Republican," and also in the newspaper printed in said county, called "The Constitution;" and that a copy of the summons and complaint be deposited in the post office, addressed to the defendant at York, Medina county, Ohio.

Publication was never made, but a summons and complaint purporting to be copies were afterwards served upon Cook personally, in the state of Ohio. Cook moved this court, at a special term held in Monroe county, in February, 1863, to set aside the order, and for other relief, upon the ground that the affidavit on which it was granted was insufficient. The court granted the motion, and the plaintiff appealed.

J. Franklin Peck, appellant, in person.

Geo. F. Danforth, for the respondent.

By the Court, JAMES C. SMITH, J. Upon every application for an order that the service of a summons may be made by publication, pursuant to the provisions of section 135 of the code, the applicant must not only show that the case falls within some one of the five subdivisions of that section, but he must also establish the central jurisdictional fact that the person on whom the service of the summons is to be made cannot, *after due diligence, be found* within the state. The circumstance that such person is a non-resident is of no importance except as it tends to establish the fact that he is not within the state at the time when the application is made. It is not necessary to inquire, in the case before us, whether the bare averment of non-residence, nothing else appearing in respect to the whereabouts of the defendant, is enough to establish the requisite fact of his absence from the state. The affidavit upon which the order in question was made, in addition to averring that Cook, the defendant in respect to

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whom the order was asked for, "is not a resident of this state," "but his residence is in the township of York in the state of Ohio," alleged also that "he frequently visits the county of Livingston," in this state, "and pretends to own and hold a valuable house and lot in Lima," in said county. These facts, it seems to me, preclude the presumption that Cook could not by due diligence have been found within this state, even if that presumption would have arisen upon the other averments in the affidavit, standing alone. It was essential to the jurisdiction of the officer that the plaintiff should go further, and make it appear satisfactorily that due diligence had been used, unsuccessfully, to find Cook within this state. The plaintiff attempted to do this, but in that respect he clearly came short of the requirements of the statute. His affidavit, which was sworn to on the 11th of January, 1862, alleged as follows: "That deponent placed a copy of the summons" &c. "in the hands of a deputy sheriff of the county of Livingston, with directions to serve the same on said Cook, on or about the 25th of November, 1861; but this deponent is *informed* by said deputy that with all diligence he has been unable to find said Cook, and deponent verily *believes* that it will be impossible to obtain due service upon said Cook in this state." This averment, as to the inability of the officer to find the defendant, is defective in two respects. (1.) It is stated by the plaintiff on *information and belief*, and no reason is shown for not producing the affidavit of the deputy from whom the information was derived. (2.) It states no *facts* tending to show that the deputy had used any diligence whatever. The question whether the attempt to make personal service has been duly diligent, is to be decided by the judge, and not by the person making the attempt. Every *fact* alleged in the affidavit may be literally true, and yet the defendant have been openly and notoriously in the county of Livingston, while the summons was in the hands of the sheriff. To hold the affidavit sufficient would open the door for great abuses under the statute

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in question, which being in derogation of the general rule of law requiring personal service of process, is to be construed strictly.

The plaintiff is not aided by the fact that after the order for publication was made, the summons and complaint were served upon Cook personally, in Ohio. It has been considered well settled law that jurisdiction of the *person* of a defendant could not be obtained by any court, except by his voluntary appearance, or by due service of process; and that effectual service of process could not be made on any person beyond the jurisdiction of the court out of which the process issued. (*Fiske v. Anderson*, 33 Barb. 71. *Fenton v. Garlick*, 8 John. 194. *Andrews v. Herriot*, 4 Cowen, 524, *in note*.) By the section of the code above referred to, personal service of summons and complaint out of this state is only made equivalent to publication and deposit in the post office, and it can have no greater effect. (*Fiske v. Anderson*, *supra*.) And it can only have that effect when *publication is ordered*.

These views are not in conflict with any of the cases cited by the plaintiff, to wit, *Brisbane v. Peabody*, (3 How. Pr. Rep. 109;) *Rawdon v. Corbin*, (*Id.* 416;) *Vernam v. Holbrook*, (5 *id.* 3;) *Roche v. Ward*, (7 *id.* 416;) *Titus v. Relyea*, (16 *id.* 371;) and *Van Wyck v. Hardy*, (11 Ab. Pr. Rep. 473.) *Brisbane v. Peabody* has no bearing upon the questions in this case. *Rawdon v. Corwin* is an authority against the plaintiff. There a motion for an order of publication was *denied* by Justice Hand, although the affidavit showed the *absence* of the defendant, (not his non-residence merely,) but it did not show that a summons had been made out, nor that there had been an effort to serve one. The judge said "The affidavit is defective. It should show that a summons and complaint have been made out, and that *due diligence to serve the same has been used, without success*." After thus disposing of the motion, he remarked, "Probably, showing that the defendant *is not in the state*,

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would be sufficient, for that shows there can be no service within the state." This is a mere *dictum*; but giving it the force of authority, it does not militate against the positions here taken, for the reason already stated in respect to the contents of the affidavit in this case, and for the further reason that showing that the defendant "is not in the state," is essentially different from a bare statement that his *place of residence* is without the state. *Vernam v. Holbrook* was decided by Parker, J. at special term, in 1850, upon the strength of the *dictum* of Justice Hand in *Rawdon v. Corwin*. It does not appear from the report of the case of *Roche v. Ward* what the affidavit in that case stated, but it is to be inferred from the opinion of the judge that it contained *some* evidence of all the essential facts, although "slight" in some particulars. If there was *no* evidence of a fact necessary to the jurisdiction, the decision was manifestly wrong, as a judge cannot acquire jurisdiction simply by deciding that he has it. In *Titus v. Relyea*, a special term order denying a motion to set aside a judgment was *reversed* at general term; the points herein discussed did not arise; and there is nothing in the case bearing upon them, except a *dictum* which fell from the judge who delivered the opinion, without any authority cited to support it. The ruling in *Van Wyck v. Hardy*, at general term in the first district, ought not to be extended beyond the facts of that case. It was made by a divided court; the learned judge who pronounced the prevailing opinion declared that he adopted his conclusion "with some hesitation;" and he placed stress upon several considerations stated in his opinion, which were somewhat peculiar in their character, and do not arise in the case before us.

Order of the special term affirmed, with \$10 costs.

[MONROE GENERAL TERM, September 7, 1868. E. Darwin Smith, Johnson and J. C. Smith, Justices.]

DAUCHY *vs.* BROWN.

A justice of the peace rendered a judgment in favor of the plaintiff for \$98 damages and \$4.65 costs, in all \$102.65, and duly entered it in his docket. A few days afterwards, discovering that he had by mistake made his costs 69 cents less than he was entitled to, he undertook to correct the error by setting that sum underneath the original footing and adding them together, without erasing or altering any part of the original docket. But afterwards, finding that it was illegal to alter a judgment, he erased the addition and thus restored the docket to its original form. *Held* that these alterations did not make the judgment void. That being made after the time limited by statute for the justice to render judgment and enter it in his docket, they were clearly *void* acts, as much as if they had been done by a stranger; and being void they could not affect the judgment.

A PPEAL from a judgment of the Monroe county court, affirming a judgment of a justice of the peace. The opinion of the court states all the material facts.

J. D. Decker, for the appellant.

J. Fuller, for the respondent.

By the Court, JAMES C. SMITH, J. The justice properly denied the defendant's application for an adjournment. Upon his own showing, the only subject in respect to which he expected the witnesses Pond and Snyder to testify was the character of one Perry, who he alleged was to be a witness for the plaintiff; but the plaintiff avowed that he did not expect to examine Perry, and stipulated not to call him. As to the witness Palmer, the defendant stated that he subpoenaed him a month previously, to attend on the *seventh of February*, the day when the application was made, but it did not appear how he could have known the cause would be tried on that day, it having been twice adjourned since the witness was subpoenaed; besides, no cause for the non-attendance of the witness was stated. The witness Voorhies, on whose account the last application for an adjournment was made, was not mentioned in the previous application, and the defendant,

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being cross-examined, disclosed the fact that he had seen Voorhies that morning, and being asked whether he told him not to come, he answered that he "told him he was going to adjourn the cause," and refused to answer any more questions. Enough was shown to warrant a denial of the applications on the ground of bad faith.

The only other question relates to the alteration of the docket of the judgment. The cause was tried by the justice on the 7th of February, and upon the same day he rendered a judgment for the plaintiff, against the defendant, for \$98 damages, and \$4.65 costs; in all, \$102.65; and duly entered it in his docket. At that time the judgment was perfect, and in all respects authorized and regular. On the 23d of February, the day when the notice of appeal was served, the justice discovered, as appears from his return, that he had by mistake made his costs sixty-nine cents less than he was entitled to, and he then undertook to correct the error by setting that sum underneath the original footing and adding them together, without erasing or altering any part of the original docket; but afterwards finding, as he states, that it was illegal to alter a judgment, he erased the addition and thus restored the docket to its original form. The defendant contends that these alterations made the judgment void. I think otherwise. They were made after the time limited by statute for the justice to render judgment and enter it in his docket, and were clearly *void* acts, as much so as if they had been done by a stranger. Being void they could not affect the judgment. They did not materially affect even the docket, which is but the evidence of the judgment, inasmuch as, notwithstanding the alterations, the docket continued at all times to show the true amount of the original judgment. It does not appear by the return that the defendant, on appealing, paid more than the original amount of costs, and if more had been required of him by the justice, he could have recovered back the excess by action. The county court has affirmed the original judgment, so that the case stands in all respects as

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if the alterations had not been made. As the alterations were void in law, and harmless in fact, and were made by one for whose acts the plaintiff was not responsible, I do not think they should have the effect to deprive him of a judgment which he has regularly recovered, and which appears to be in all respects just.

The cases cited by the defendant's counsel do not sustain his position. The only point decided in *Watson v. Davis*, (19 *Wend.* 371,) is that a judgment rendered by a justice after the four days given by statute for that purpose is erroneous; and in *Bissell v. Bissell*, (11 *Barb.* 96,) that although the fourth day is Sunday, a judgment rendered on the following Monday is void. *Sibley v. Howard*, (3 *Den.* 72,) merely decides that determining the amount of costs to be paid by the losing party is parcel of the act of rendering judgment, and must be done by the justice within the time prescribed by statute. In the case at bar, as has already been remarked, the amount of costs was determined, and the judgment was rendered, and regularly entered in the docket, on the day when the cause was submitted to the justice. The case of *The People, ex rel. Phelps, v. Delaware Common Pleas*, (18 *Wend.* 558,) also cited by the defendant's counsel, is an authority against him. In that case, at the close of the trial, and while the parties were present, the justice made up, entered in his docket, and declared a judgment for the plaintiff for \$46.98 damages, besides costs. Afterwards, on the same day, he discovered that in adding up the demands which he intended to allow the plaintiff, he had by mistake made the sum to be \$10 too large, and he then altered his docket so as to make it a judgment for \$36.98 damages, besides costs; but it did not appear that the defendant knew of the alteration. On appeal by the defendant to the common pleas, the plaintiff had a verdict for \$34.48, and that court regarding the justice's judgment as being for \$46.98, allowed the defendant costs of the appeal, on the ground that *the recovery had been reduced more than ten dollars*, pursuant to 2 *R. S.* 263,

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§ 218, *sub.* 1; and the plaintiff having made a motion in the supreme court to vacate the order allowing costs, it was denied. This decision cannot be upheld, except upon the ground that the original judgment remained *valid and effectual*, notwithstanding the subsequent alteration, even although the alteration was made *within* the time given by statute for rendering judgment.

The judgment of the county court should be affirmed.

[MONROE GENERAL TERM, September 7, 1863. *Johnson, J. C. Smith and Welles, Justices.*]

CROMWELL vs. BENJAMIN.

A husband may be liable for necessities furnished to the wife, in certain cases, though the existence of an agency or assent, express or implied in fact, is wholly disproved by the evidence; and this upon the ground of an agency implied *in law*, though there can be none presumed in fact.

A husband is legally bound for the supply of necessities to his wife, so long as she does not violate her duty as wife. He may discharge this obligation by supplying her with necessities himself or by his agents, or giving her an adequate allowance in money; and then he is not liable to a tradesman who without his authority, furnishes her with necessities.

But if he does not himself provide for her support, he is legally liable for necessities furnished to her by tradesmen, *even though against his orders.*

Where goods have been thus furnished by a tradesman, the only questions to be considered are, whether the husband failed to provide suitably for his wife's support, and whether the articles sold by the plaintiff were necessities.

And if there is *some* evidence to sustain the finding of a referee, upon those questions, his decision will be conclusive.

The liability of a father to furnish necessities for his minor and invalid children who are members of his family and unable to support themselves by their labor, depends upon principles analogous to those which govern the relation of husband and wife.

APPEAL by the defendant from a judgment entered upon the report of a referee. The action was brought to recover the value of a bill of goods, sold and delivered by the

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plaintiff to the defendant's wife and children. The referee found as facts, that the plaintiff had sold and delivered to the defendant, at his store in Wolcott, between November 26, 1860, and September 22, 1861, goods to the amount of \$162.99, which were charged in account to the defendant, and which sum became due to the plaintiff before the commencement of this action, and had not been paid. And as a conclusion of law, the referee found that the plaintiff was entitled to recover against the defendant \$162.99, with costs.

T. R. Strong, for the appellant.

Cromwell & Monroe, for the respondent.

By the Court, J. C. SMITH, J. If the liability of a husband for necessities furnished to his wife rested solely on the ground of an agency in *fact*, express or implied, it would be somewhat difficult to sustain the report of the referee in this case. Although, during cohabitation, the assent of the husband to all contracts of the wife for necessities is presumed unless the contrary appears, yet the presumption is liable to be rebutted; and if before the purchase, the husband forbids the wife to trade on his account, and this fact is brought home to the knowledge of the party contracting with her, there is in that case no room for such presumption. In the case at bar, the evidence shows without contradiction that the defendant's wife and children to whom the goods in question were delivered, had been previously forbidden by him to trade upon his credit, and there is no evidence that he subsequently knew of the purchase, until he was called on for pay, or that he in any manner ratified or assented to it. It also appeared by the testimony of the defendant that he had notified the merchants trading at Wolcott not to charge goods to him. It is not shown at what time this notice was given, but the inference is irresistible, that it was before the plaintiff opened a store there, which was in April, 1860, as the defendant

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"did not know there was such a store as the plaintiff's at Wolcott," till a few days before the bill was presented to him; and it is quite clear from the testimony of Boylan, the plaintiff's clerk who sold part of the goods, that when he opened the account he had heard of the defendant's unwillingness that his family should trade upon his credit. Upon this state of the evidence I do not think the defendant could be held liable on the ground of an agency in fact.

But the husband may be liable for necessities furnished to the wife, in certain cases, though the existence of an agency or assent, express or implied in fact, is wholly disproved by the evidence, and this, upon the ground of an agency implied *in law*, though there can be none presumed in fact. It is a settled principle in the law of husband and wife, that by virtue of the marital relation, and in consequence of the obligations assumed by him upon marriage, the husband is legally bound for the supply of necessities to the wife, so long as she does not violate her duty as wife; that is to say, so long as she is not guilty of adultery or elopement. The husband may discharge this obligation by supplying her with necessities himself or by his agents, or giving her an adequate allowance in money, and then he is not liable to a tradesman who, without his authority, furnishes her with necessities; but if he does not himself provide for her support, he is legally liable for necessities furnished to her by tradesmen, *even though against his orders.* (2 *Smith's Lead. Cas.* 440.) In view of this principle, the only questions in the case at bar are whether the defendant did not provide suitably for his wife's support; and whether the articles sold by the plaintiff were necessities. These are pure questions of fact, and they were controverted before the referee, each party having given much testimony respecting the circumstances of the defendant, the condition of his family, the amount of necessities with which they were supplied by the defendant, and the character of the articles sold to them by the plaintiff.

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There is at least some evidence to sustain the finding of the referee upon both questions, and his decision is conclusive.

The liability of the defendant to furnish necessaries for his son who was a minor, and for his daughter, who, although a few years past her majority, was unmarried and a member of his family, and who, as appeared by testimony in the case, was an invalid unable to support herself by her labor, springs from the relation of a parent to his offspring, and depends upon principles analogous to those above considered in respect to his liability to support his wife.

I think the judgment should be affirmed.

[MONROE GENERAL TERM, September 7, 1863. *Johnson, J. C. Smith and Welles*, Justices.]

NATH'L R. PORTER vs. JOHN MOUNT and HARRIET MOUNT.

The statute which authorizes a party paying usurious interest for the loan or forbearance of money, to sue for and recover the excess, within *one year* next after such payment, is cumulative, and does not take away the common law remedy of the borrower to recover such excess in an action for that purpose, which may be brought at any time within six years.

The borrower's common law right of action is not *absolutely* suspended during the three years given to the overseers or superintendents of the poor for suing, by the statute, but he may sue during that period *provided* neither of such officers has previously sued for the same matter, and not otherwise. If an action has been brought by those officers, previously, it is the duty of the defendant, in an action brought by the borrower, to show that fact, affirmatively.

An action may be maintained by a borrower, against husband and wife jointly, to recover back money paid as usurious interest, where the money loaned, and the security taken therefor, belonged exclusively to the wife, as a part of her legal estate, and the money taken for the loan and forbearance was paid to and received by her, and the husband, so far as he participated in the transaction, acted for her and with her knowledge and assent.

Under the provisions of the acts of 1848 and 1849 for the more effectual protection of the property of married women, a married woman, having a separate legal estate consisting of money, may lend the same, take and

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hold securities therefor in her own name, and sue for and enforce them at law. And the power to do these things includes the ability to make all contracts incident thereto. She is not exempt from the liabilities which the law imposes upon all other lenders of money.

Dictum of Spencer, Ch. J. in *Wheaton v. Hibbard*, (20 John. 290,) overruled.

ACTION to recover back \$286, usuriously paid by the plaintiff to the defendants for the loan and forbearance of \$1000, and for interest from the time of such payment. The plaintiff alleged, in his complaint, that on the 5th of May, 1857, he applied to the defendants for a loan of \$1000, and the defendants corruptly agreed to lend and advance him that sum provided he would pay them, for the use of the same for about one year, the sum of \$136 over and above the rate of interest allowed by law, and on the further condition that the plaintiff would secure the payment of the same by the execution and delivery of a bond and mortgage on real estate. And that on the 5th day of May, 1857, at Burns, in the county of Allegany, the defendants lent and advanced to the plaintiff the said sum of \$1000, and the plaintiff, with his wife, executed and delivered to the defendant Harriet Mount the said bond and mortgage, and the plaintiff paid, and the defendants corruptly and unlawfully received from him the sum of \$136 for the loan of the said \$1000, over and above the legal rate of interest; and that a part of said \$1000 was the separate property of the defendant Harriet Mount. The plaintiff further alleged that the mortgage being due and unpaid, and he being unable to meet the payment thereof, on or about the 1st of November, 1858, the defendants corruptly agreed to extend the time of payment, for one year, on condition that the plaintiff would pay to the defendants the sum of \$100, to which the plaintiff agreed; and that the defendants, in pursuance of that agreement, corruptly and unlawfully received from the plaintiff and the plaintiff gave his note for, and subsequently paid, the said sum of \$100, over and above the legal rate of interest, for such extension of payment. The complaint then alleged a similar agree-

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ment made November 1, 1859, to extend the time of payment for one year, and the payment of \$50 to the defendants as a condition of such extension, over and above the legal rate of interest. The plaintiff alleged that he had paid in full the said bond and mortgage with interest; and that no other proceedings had been instituted to recover back the said sums so paid by him in excess of the legal interest.

The defendants put in separate answers, in which they each denied the allegations in the complaint, and insisted that the action was not brought within one year after the payment of the money, or any part of it, in the complaint alleged to have been paid corruptly and usuriously to the defendants.

The action was commenced March 24, 1862. It was tried at the circuit held in Livingston county in January, 1863, before JOHNSON, J. and a jury. It was admitted that the defendants were, and all the time continued to be, husband and wife, and that the alleged excess of interest was paid more than one year before the commencement of this action. At the close of the plaintiff's testimony the defendants moved for a nonsuit on the grounds: 1. That the statute of limitations of one year, applied to this case. 2. That the plaintiff had not established a joint liability on the part of the defendants. The plaintiff insisted that the statute did not apply to an action at common law, and that the taking of the money wrongfully, by the defendants, was a joint act, and that the wife was liable to account for such money, and her separate estate was also liable. And he insisted upon his right to go to the jury upon the facts of the case as proven, and that he was entitled to a verdict for such amount and interest. But the court nonsuited the plaintiff, directing a case to be made, and the action taken to the general term for its decision.

R. L. Dorr, for the plaintiff.

Bemis & Stevens, for the defendants.

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By the Court, JAMES C. SMITH, J. This is an action to recover money alleged to have been received by the defendants as excessive and unlawful interest for the loan and forbearance of money. The first question presented is whether the action is barred by the special statutory limitation existing in this state in respect to certain actions of this nature. The plaintiff is undoubtedly correct in his position that the statute, (1 R. S. 772, § 3; 1 R. L. 64,) which authorizes the party paying usurious interest for the loan or forbearance of money, to sue for and recover the excess, within *one year* next after such payment, is cumulative, and does not take away the common law remedy of the borrower to recover such excess in an action for that purpose, which may be brought at any time within six years. It was so held by the supreme court in *Wheaton v. Hibbard*, (20 John, 290,) under the act of 1787, which was substantially the same as our present statute, in respect to this question. (*Schroeppel v. Corning*, 2 Seld. 107, *per Paige*, J. 115, and *Foot*, J. 118.) But our statute, which was taken from that of 12 Anne, ch. 16, contains a further provision, which was not in the English statute, that if the person paying usury shall not bring his suit within the year, and prosecute it to effect, then the excess so paid may be sued for and recovered with costs, at any time within three years after the said one year, by any overseer of the poor of the town, or by any superintendent of the poor of the county in which the payment may have been made. (§ 4.) The statute of 1787 contained a similar provision, allowing *any other* person to prosecute within *one year* next after the year allowed to the borrower; and in view of that provision, Justice Spencer, delivering the opinion of the court in *Wheaton v. Hibbard*, (*supra*,) said: "The injured party cannot have both remedies, and if he neglect to pursue the statute remedy for more than a year, his right of action at common law would be *suspended* during the second year, for, peradventure a third person may prosecute." If this construction is correct, it follows that on the 24th day of March,

1862, when this suit was commenced, the plaintiff's right of action, in respect to the interest paid on the first day of April, 1858, and the fifth of November, 1859, was suspended by the provision of our present statute, which gives a right of action to the public officers named, during three years next after the one year. However his right of action was in full force in respect to the payment made on the 15th of April, 1857, because as to that the three years had expired, and the public officers had not sued, so that in any view of the case, the statute limitation was not a bar to the whole cause of action. But as the question in respect to the effect of the statute upon his right of action for the other payments will arise again upon a new trial, it is proper that it should now be considered. The remark of Judge Spencer, above referred to, is *obiter dictum*; no authority is cited in its support; and with due respect for the opinion of the learned judge from whom it fell, I am inclined to think it is not wholly correct. If the borrower's right of action is suspended during the three years, either the statute continues to run in the mean time, and thus the period within which the borrower may sue is practically reduced from six years to three, or else the running of the statute is suspended with the cause of action, and thus the time within which the borrower may sue is extended from six years to nine. I think a better rule of construction is stated by Lord Coke, in *Foster's case*, (11 Rep. 64,) thus: "In all acts which are introductive of a *new* law, the express designation of one person is the *exclusion* of all other;" * * * but "in many cases the designation of a new person, in a later act of parliament, shall not exclude another person who was authorized to do the *same* thing by a *precedent* act." And he gives the following illustration of his meaning: "It is enacted by the statute of 8 Hen. 6, ch. 16, that after office found, &c. he who finds himself grieved, may within the month, offer a traverse, and to take the lands and tenements to farm, and that then the chancellor, treasurer and other officer shall let them to him to farm, until, &c. And now,

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by the statute of 1 Hen. 8, 16, he has liberty by the space of three months: and afterwards the statute of 32 H. 8, 40, gave authority to the master of the wards, with the advice of one of the council, to make a lease of the lands of a ward or of an idiot, during the time they shall remain in the king's hands; although the latter act designs another person, yet it doth not utterly take away the first; for if before any lease made by the master of the wards, the chancellor and treasurer make one according to the statute of 3 H. 6, then the said master cannot demise it; and so if the master makes it first to another, the chancellor and treasurer cannot demise it to the party grieved." The rule laid down by Lord Coke is applicable to the case in hand, as it is manifestly immaterial whether the first authority is given by a precedent *statute*, or by the common law, if there are no negative words, or words of exclusion, in the later act. The two are to stand together as far as possible. I think, therefore, the borrower's common law right of action is not *absolutely* suspended during the three years given to the public officers by the statute, but he may sue during that period, *provided* neither of such officers has previously sued for the *same* matter, and not otherwise. In this case it is not alleged or proved that the officers have sued, and if the fact were so, it should have been shown affirmatively by the defendants. If these views are correct, the statute in question is not a bar to the plaintiff's action in respect to either sum paid by him.

The remaining question to be considered is whether the evidence, in any view that may properly be taken of it, establishes a cause of action against both defendants. At the time of the loan, and of the payment of the several sums of money sought to be recovered, the defendants were husband and wife. Upon the argument before us, and also upon the trial, as I infer from the printed case, it was taken for granted that the wife had a separate legal estate under the provisions of the statutes of 1848 and 1849 for the more effectual protection of the property of married women; and the evidence

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tends to show, and if submitted to the jury would have authorized them to find, that the money loaned, and the security taken therefor, belonged exclusively to the wife as a part of her legal estate, and that the money taken for the loan and forbearance was paid to and received by her, and that her husband, so far as he participated in the transaction, acted for her and with her knowledge and assent. In this view of the case I am of the opinion that the action may be maintained. There can be no doubt but that under the provisions of the statutes above referred to, a married woman, having a separate legal estate consisting of money, may lend the same, take and hold securities therefor in her own name, and sue for and enforce them at law. The power to do these things, includes the ability to make all contracts incident thereto. (*See Barton v. Beer*, 35 Barb. 78.) As her common law disabilities are removed to this extent, and she may enforce at law contracts in relation to the loan and forbearance of money upon interest, to which she is a party, and enjoy the benefits and profits accruing from them, it would be intolerable to hold that she is exempt from the liabilities which the law imposes upon all other lenders of money. The basis of this action is an obligation on the part of the lender to refund the excess which the law implies from the nature of the transaction. The statutes referred to permit married women to engage in the business of lending money, but not to take usury, and if they receive it, they are under the same legal obligation to restore it as other usurers. This legal obligation may be enforced against a married woman by an action *at law*, under the provisions of the statute of 1860, (*Laws* 1860, p. 158, ch. 90, § 7,) which was in force when this action was commenced; and as the law *now* stands, a judgment may be given against her, and may be enforced by execution against her separate legal estate, the same as if she were sole. (*Laws* of 1862, p. 345, ch. 172, § 7. *Id.* pp. 849, 850, ch. 460, §§ 12, 13.)

In this view of the case, it is no objection that the husband

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was joined with his wife as a defendant. Sec. 114 of the code provides that when a married woman is a party, her husband *must* be joined with her, except, &c. This section is unrepealed, and the only statute modifying it when this action was brought is that of 1860, (*Laws of 1860, p. 158, ch. 90, § 7,*) which provides that when the suit relates to her separate property, she *may* sue or be sued alone. If the husband was not personally liable, the jury could have rendered a verdict accordingly, and the judgment might have been so framed as to protect his rights.

I think there should be a new trial, with costs to abide the event.

New trial ordered.

[MONROE GENERAL TERM, September 7, 1868. *E. Darwin Smith, Johnson and J. C. Smith, Justices.*]

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HOLMES and others vs. GILLILAND and others.

A statute of another state, under which the plaintiffs claimed to have been incorporated, declared that persons associating under articles of agreement according to the statute, and who should *comply with all the provisions* thereof, should constitute a body politic and corporate. It then provided that before any corporation so formed should commence business, the officers should cause the articles to be published in two newspapers, &c. *Held*, that a corporation might be such for all the purposes of bringing an action, without publication. SUTHERLAND, J. dissented.

Held, also, that general reputation that the plaintiffs were conducting business as a corporation, coupled with the fact that the note sued on was payable to them, was sufficient evidence of the existence of the corporation to prevent a dismissal of the complaint, for want of proof of publication of the articles.

APPEAL from a judgment ordered at the circuit, dismissing the complaint. The action was brought by the plaintiffs, claiming to be a corporation incorporated under the laws of the state of Connecticut, upon a promissory note

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made by the defendants, payable to the corporation. The plaintiffs proved, on the trial, that they had complied with all the provisions of the statute of Connecticut relative to the formation of corporations, except the one requiring any corporation formed under the statute to publish its articles of association in two newspapers, before commencing business. No proof being given or offered, showing such a publication, the court dismissed the complaint; holding that proof of publication was necessary, in order to show that the plaintiffs were a corporation.

Mr. Birney, for the plaintiffs.

L. Birdseye, for the defendants.

LEONARD, J. The defense is purely technical. The publication is not, by the statute, a portion of the proceedings for the formation of a corporation. The publication must be made before the corporation commences business. It may be a corporation for all the purposes of bringing an action without publication. If the publication be omitted, the corporation might be restrained or wound up; but it would not enable a debtor to escape payment.

General reputation is sufficient evidence of user, *prima facie*. General reputation that the plaintiffs were conducting business as a corporation, coupled with the fact that the note mentioned in the complaint is payable to the plaintiffs, was sufficient evidence of the existence of the corporation to prevent a dismissal of the complaint.

I think also it was competent for the legislature of Connecticut to declare what should be sufficient *prima facie* evidence of the formation of a corporation. (2 *Bosw.* 166.)

The judgment should be reversed, and a new trial ordered; costs to abide the event.

CLERKE, J. concurred.

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SUTHERLAND, J. (dissenting.) Whether the plaintiffs were in fact a corporation depended upon the laws of Connecticut; upon whether the plaintiffs, in undertaking to organize as a corporation under the statute of Connecticut, had complied with the requirements of the statute. But on the trial of this action, it was for the court to pass upon the competency and sufficiency of the evidence given and offered to show that the plaintiffs had complied with the requirements of the Connecticut statute, and were a corporation, under laws or rules of evidence in force in this state.

The legislature of Connecticut cannot make a rule of evidence for the courts of New York.

No question is made but that the plaintiffs did by competent and sufficient evidence show that they had complied with all the provisions of the Connecticut statute, except the provision requiring any corporation formed under the statute to publish the articles of association in two newspapers, before it shall commence business. No competent or proper evidence was given, or offered, to show such publication, and therefore the court dismissed the complaint.

The question is, then, was it necessary for the plaintiffs to prove this publication, to show that they were a corporation. Though the question may not be free from doubt or difficulty, yet upon the whole I think the proof was necessary.

The express words of the 196th section of the Connecticut statute are, "Any number of persons, not less than three, who, by articles of agreement in writing, have associated, or shall associate, according to the provisions of this chapter, &c. and who *shall comply with all the provisions of this chapter*, shall, with their successors and assignee, constitute a body politic and corporate," &c. Now the first provision of section 210 is, "Before any corporation formed and established by virtue of the provisions of this chapter shall commence business, the president and directors thereof shall cause their articles of association to be published at full

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length, in two newspapers published in the county in which such corporation is located, or in any adjoining county ;” and the section then proceeds, “and shall *also* make a certificate of the purposes for which such corporation is formed; the amount of their capital stock,” &c. &c.

Looking then at the provisions of the statute which have been referred to, how can it be said that the publication of the articles of association was not as necessary as the making of them, or as any other requirement of the statute, for the formation or creation of the corporation? The 196th section, in words, requires *all* the provisions to be complied with.

The Connecticut act of 1854, making a certified copy, by the secretary of state, of the certificate of the president and directors, deposited in his office, *prima facie* evidence, cannot be regarded here as a law or rule of evidence. If it could be viewed as a legislative construction, as to the requirements of the statute under which the plaintiffs claim to be a corporation, great weight should be given to it; but I do not think it can be regarded in that light.

I think the judgment should be affirmed with costs.

New trial granted.

[NEW YORK GENERAL TERM, March 7, 1864. *Leonard, Clarke and Sutherland*, Justices.]

THE PHENIX BANK OF THE CITY OF NEW YORK *vs.*
DONNELL.

It need not be stated, in a complaint, that the plaintiff has legal capacity to sue. The want of such an allegation affords no ground of demurrer. *Per Leonard, P. J.*

A corporation suing as such, need not allege in the complaint, that it is a corporation duly incorporated and has legal capacity to sue.

Where a plaintiff sues by an appropriate corporate name, it is not necessary to expressly aver in the complaint that the plaintiff is a corporation; there

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being in such a case an implied averment in the complaint that the plaintiff is a corporation. *Aliter* in a suit by a corporation incorporated by the name of an individual. *Per Sutherland J.*

APPEAL from an order made at a special term, overruling a demurrer to the complaint. The complaint was in the name of "The Phenix Bank of the city of New York, plaintiffs in the above entitled action," without any statement or averment of its incorporation. The defendant demurred, and stated the following grounds of demurrer: 1. That it appeared by the complaint that the plaintiff had not legal capacity to sue. 2. That it did not appear that the plaintiff was a corporation, duly incorporated and entitled to sue. 3. That the complaint did not state facts sufficient to constitute a cause of action.

The special term overruled the demurrer, and ordered judgment for the plaintiff, but with leave to the defendant to answer, on payment of costs.

Cummins, Alexander & Green, for the appellant.

E. S. Van Winkle, for the respondent.

LEONARD, P. J. Although there is no allegation in the complaint that the plaintiff has legal capacity to bring an action, nor that the plaintiff is a corporation, it is difficult to assume that such capacity does not exist. A demurrer can be taken only when the grounds to support it appear from the pleadings. Otherwise the objection must be taken by plea or answer, stating the particular facts which constitute the defense or objection.

Can it be said that the plaintiff is not a corporation? The negative is not apparent from the complaint.

The revised statutes provide (2 *R. S.*, 458, § 3,) that "in suits brought by corporations created by or under any statute of this state, it shall not be necessary to prove on the trial of the cause the existence of such corporation, unless the defend-

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ant shall have pleaded, in abatement or in bar, that the plaintiffs are not a corporation." This statute provides, by implication, that the defendant shall aver the fact in question, if he wishes to raise such an issue. The complaint need not aver any fact which it is unnecessary for the plaintiff to prove in order to maintain his action.

It need not be stated in a complaint that the plaintiff has a legal capacity to sue. The want of such an allegation affords no ground of demurrer. The want of capacity must appear before it can become a ground of demurrer from the facts that are stated, not from the omission of facts that would expose such want. (*The Union Mutual Ins. Co., v. Osgood*, 1 Duer 707, and authorities cited.)

In the case of the *Bank of Genesee v. The Patchin Bank*, (3 Kern, 313,) the complaint expressly alleged the corporate existence of the plaintiff, and the defendants denied, by their answer, every allegation of the complaint. Judge Denio held that this pleading did not require the plaintiffs to prove their corporate character; and this was the opinion of the court in that case. It was further held that the provision of the revised statutes, above referred to, is not abolished by the provisions of the code. Judge Denio also says, page 314, "If the defendant really desired to litigate that question, he was required to plead the fact expressly." This appears to be conclusive authority that the allegation that the plaintiffs are not a corporation must be expressly averred by the answer in order to raise the question, and that the issue cannot be raised by a negation of the allegation in the complaint. Of course, then, if the allegation of the fact in the complaint, denied by the answer, imposes no necessity for the plaintiffs to prove their corporate character, there can be no rule of pleading requiring such an allegation in the complaint.

It is unnecessary to consider the question separately under the sixth subdivision of section 144 of the code. That subdivision is not applicable to the ground of demurrer here

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insisted on. (*Conn. Bank v. Smith*, 9 Abb. P. R. 173, opinion by *Clerke, J.*)

The judgment should be affirmed, with costs.

CLERKE, J. concurred.

SUTHERLAND, J. I concur in the conclusion. I am willing, out of respect for the decisions in the *Union Mutual Ins. Co. v. Osgood*, (1 Duer, 707,) *Kennedy v. Cotton*, (28 Barb. 63,) and *Shoe and Leather Bank v. Brown*, (18 How. Pr. Rep. 308,) to hold that where, as in this case, the plaintiff sues by an appropriate corporate name, it is not necessary to expressly aver in the complaint that the plaintiff is a corporation, on the ground that in such a case there is in the complaint an implied averment that the plaintiff is a corporation; though it appears to me that the English cases and the cases in this state, cited in the two first mentioned cases, decide merely on this point, that the complaint need not aver how the plaintiff was incorporated; that is, need not set out or refer to its act of incorporation, or its right or title to be a corporation.

Before the revised statutes, the plea of the general issue put in issue the fact of the plaintiff being a corporation, (*Bank of Utica v. Smalley*, 2 Cowen, 778, and cases cited;) and how could that be, unless the complaint contained an averment, express or implied, that the plaintiff was a corporation?

So the provisions of the revised statutes, that in suits brought by corporations, it shall not be necessary to prove on the trial the existence of such corporation, unless the defendant has pleaded in abatement or in bar that the plaintiffs are not a corporation, rather implies that it should appear from the complaint that the plaintiffs sue as a corporation, for otherwise there would be nothing to put the defendant upon inquiry, whether in fact the plaintiffs were a corporation. In other words, the right of the defendant,

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recognized by the statute, to expressly plead, in abatement or in bar, that the plaintiffs were not a corporation, would seem to imply that it should appear from the complaint that the plaintiffs sue as a corporation.

I have no doubt that in a suit by a corporation incorporated by the name of John Smith, or of John Smith and Robert Smith, the complaint should contain an express averment that the plaintiff is a corporation.

Judgment affirmed.

[NEW YORK GENERAL TERM, May 2, 1864. *Sutherland, Leonard and Clerke, Justices.*]

 LAWRENCE and others vs. GEBHARD.

If the power of making and indorsing promissory notes for and in the name of a corporation is not expressly conferred upon its agent and attorney, by the instrument by which he is appointed, general words, at the conclusion thereof, authorizing him "to do all other acts and things for and in behalf of the said company that he may deem proper to further and protect its interests," cannot have that effect. *SUTHERLAND, J. dissented.*

Proof that the agent of a corporation is in the habit of giving notes for the company is inadmissible, unless accompanied by proof that the company had some knowledge that the agent was in the practice of giving notes in its name.

The fact that such agent is a director gives him no authority, except when acting as a member of the board; unless there is some by-law conferring power upon him.

THIS action was tried May 14, 1862, before the court at the circuit, the parties having waived a jury. The action was commenced against the defendant as a stockholder of the Saint Anthony Falls Water Power Company, located in the state of Minnesota, to recover \$2455.34, being the amount of two promissory notes; one for \$543.27, dated St. Anthony Falls, February 1, 1859, signed as follows: "St. Anthony Falls Water Power Company, by Richard Chute, agent and

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attorney in fact;" the other for \$1908.57, dated St. Anthony, May 5, 1859, made payable to the order of said corporation, and signed and indorsed "St. Anthony Falls Water Power Company, by Richard Chute, agent." The charter of the company provides that "each of the stockholders of said company shall be personally liable for the debts of said company to an amount equal to the amount of the capital stock held by said stockholders." The defendant was a stockholder in said company to the amount of \$80,000 from July 4, 1856. The note for \$543.27 was a renewal of a note for \$522, dated August 31, 1858, for goods sold said company by William Garcelon & Co. These goods were sold from October 1, 1857, to August, 1858. The note for \$1908.57, was a renewal of a note for \$1829.20, dated January 5, 1859, which last note was given in renewal of a note dated November 14, 1857. This note was given for merchandize sold and delivered about that time.

The charter authorizes the company to appoint a general agent, and provides that the company shall give the agent a power of attorney, and if it "be general, the said company shall be bound by the acts of said agent to whatever extent said agent assumes to act." The company, by its stockholders, in the manner prescribed by the charter, April 26, 1856, appointed Richard Chute general agent, and passed a resolution giving said agent full and complete authority to do any and all acts he might deem for the interest of said company, except that he should not sell the water power of said company; and instructed and authorized the president and directors to make, execute and deliver to him a power of attorney, granting him "full power and authority to do all things contemplated by this resolution." The defendant gave his written consent to this resolution. The company in pursuance of said resolution duly executed a power of attorney to said agent, dated May 1, 1856, by which he was constituted and appointed "the true and lawful agent and attorney of the St. Anthony Water Power Company, for and in its name to

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take charge of, manage and transact all business affairs and concerns connected with the real and personal estate and property, water right, privileges and appurtenances belonging to the said St. Anthony Falls Water Power Company, wherever situated, that they do now or may hereafter own, and in its name to contract for the improvement or sale and delivery, or for the leasing or letting of said real estate and personal property, and to collect and receive the consideration money of such sale or sales, and the income arising from such leasing or letting, and full receipts, acquittances and discharges for the same to give, and in the name of said company to commence and prosecute to final adjudication, or to compromise or terminate all suits and proceedings, whether at law or in equity, that he may judge necessary to maintain in relation to its real estate and personal property, and to collect and receive the proceeds of such suits and proceedings, and full receipts and discharges for the same to execute and deliver; and upon the sale of any of the real or personal estate, or property of said company, to sign, seal, execute, acknowledge and deliver, for and in behalf of said company, and as their agent and attorney, all or any necessary or proper contracts, deeds, conveyances or other instruments, and to insert in such deed or deeds the full covenants and warranty usually inserted in the western states and territories of the United States, and generally to do all other acts and things for and in behalf of said company that he may deem proper to further and protect its interests." Provided, however, that he should not sell the water power. The consideration of the note for \$543.27, was merchandise, sold and delivered to the said company by Wm. Garcelon & Co. The consideration of the note for \$1908.57, was for merchandize, sold and delivered under substantially the following circumstances, viz: Said company, owning a large tract of land at St. Anthony Falls, desired to have a first class hotel erected in the middle thereof, in order to increase the value of the company's lands, and to induce parties to purchase lots of

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said company and erect buildings thereon. The company assumed an agreement, dated November 10, 1855, made with James M. Winslow, as to the erection of said hotel, which had been made by the defendant and the other stockholders prior to said company being chartered. The company expecting to derive a large benefit from the successful maintenance of said hotel, had subscribed, together with several citizens, for the furnishing and opening of said hotel. In 1857 the hotel had been completed, but not furnished, and Winslow leased the same to U. V. Mattison & Brother. Mattison went east and purchased furniture, &c. including the amount for which said \$1908.57 note was given. The vendors came on with the furniture purchased, to Prairie du Chien, and refused to deliver the furniture unless the same was paid for or payment secured. As an inducement for Mattison to go east and purchase furniture, the company and the citizens made a subscription of \$10,000, said company agreeing to pay \$5000 thereof, pursuant to an agreement by a majority of the directors. It was found, after the said furniture arrived at Prairie du Chien, that the Mattisons could not pay for the goods and open the hotel so as to comply with the conditions of the \$10,000 subscription, and consequently the goods would be returned to the eastern sellers; and in order to induce the eastern sellers to deliver the goods, the company made a further subscription of \$1000, and gave the note in question in part payment of their said subscription of \$6000. Richard Chute deemed this for the best interests of said company. The company had contributed the blocks of ground on which the hotel was built and \$4150 in money to induce and insure the building of the hotel. The purchasing of the furniture and opening said hotel, was but carrying out one of the great aims and objects of this company.

Richard Chute was examined as a witness, under a commission. Being asked whether he, as agent of said company, under said power of attorney, had made or given any other promissory notes for said company, and whether it had been

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his practice to give notes for said company, the defendant's counsel objected to the interrogatory as irrelevant. The court sustained the objection and excluded the interrogatory, and the plaintiffs excepted.

The judge before whom the cause was tried found that Chute had no power or authority to make or indorse the notes in suit in the name of, or for the company, so as to make the defendant liable for their payment or consideration, as a stockholder, and that said notes and their several renewals were made and indorsed by Chute, professing to act as the company's agent without any authority given him by the board of directors.

And as a conclusion of law, he found that the defendant was entitled to judgment against the plaintiffs, with costs. Judgment being entered accordingly, the plaintiffs appealed.

Solomon L. Hull, for the appellants.

J. W. Gerard and *T. C. T. Buckley*, for the respondent.

LEONARD, J. The judgment should be affirmed. 1st. The power of attorney does not authorize the making of notes. There is no general power given to the agent, except in respect to the matters previously specified.

2d. The judge was correct in refusing to allow the plaintiffs to prove that the agent was in the habit of giving notes for the company. The plaintiffs should have accompanied it with an offer to prove that the company had some knowledge that the agent was in the practice of giving notes in the name of the company—otherwise the proof offered was immaterial.

The fact that Chute was a director gave him no authority, except when acting as a member of the board, unless there was some by-law conferring power on him.

CLERKE, J. The case of the *British Bank v. Turquand*, (6 *Ellis & Blackburn*, 327; 88 *Eng. Com. L. R.* 325,) referred

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to in the opinion of Judge Sutherland, is totally different from the case before us. In that case, the deed of settlement, organizing the company of which the defendant was the manager, allowed the directors to borrow on bond such sum or sums of money as should from time to time, by a resolution passed at a general meeting of the company, be authorized to be borrowed. The directors accordingly borrowed on bond the amount for which the representative of the company was sued; but the plea set up that there had been no general resolution of the company authorizing the making of the bond. On demurrer, the court held that the dealings with such companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. The lender, on reading the deed of settlement, would find not a prohibition from borrowing, but a permission to do so, on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done. In the case under consideration, the charter of the St. Anthony Water Falls Company does not allow any agent who may act for them to make notes, binding the company, for any purpose which he may deem proper, whether it is or is not within the specific powers confided to him. The question here is as to the extent of the power given to the agent; if we do not find that this unlimited power of signing notes is specified, the general words at the conclusion of the instrument, constituting him agent, cannot have that effect.

I agree with Judge Leonard, in thinking that the judgment should be affirmed with costs.

SUTHERLAND, J. (dissenting.) First, had the corporation power to make the notes? By the first section of the act of incorporation, the corporation, by the name and style of

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"The Saint Anthony Falls Water Company," are expressly authorized "to have, purchase, receive, possess, sell, convey, and enjoy real and personal estate; to sue and be sued, plead and be impleaded, answer and be answered unto, defend and be defended in courts of record and elsewhere, and to do any and all acts that the members thereof might or could lawfully do as individuals; and shall have and enjoy all proper remedies at law and equity to secure and protect them in the exercise and use of the rights and privileges, and of the performance of the duties herein granted and enjoined, and to prevent all invasion thereof, or interruption in exercising and performing the same," &c.

It is a most extraordinary and significant fact, and one to be particularly noted on this question of power, as well as other questions in the case, that the purpose, or business, for which the corporation was created is not defined, or even mentioned, in this section, nor in any other part or portion of the act of incorporation. I think the counsel for the respondent is mistaken in supposing that the ninth section defines or limits the purpose or business for which the corporation was created. That section authorizes the corporators "for the purpose of the improvement of the water power, above and below the Falls of St. Anthony in the Mississippi river, to maintain the present dams," &c. This is only saying, in substance, that if the corporators should undertake the improvement of the water power, &c. they shall have power in carrying on that business, to do the acts or things particularly mentioned in the section. I do not think that this section can be considered as limiting the business of the corporation to the improvement of the water power, &c. or of any water powers, owned, or to be owned, by the corporators.

I cannot find in the act of incorporation any limitation or qualification of the extraordinary general grant of power by the first section, except such as may be contained in, or implied by, the two provisos at the end of the ninth section;

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the first providing that in improving the water power, or water powers, "the said corporation should give free passage for all loose logs," &c.; and the second, "that nothing herein contained shall be so construed as to authorize said corporation to interfere with the rights of property of any other person or persons whatever;" and I think, from the whole act, it is fair to infer that the ninth section was inserted in the act mainly for the purpose of expressly qualifying the extraordinary general grant of power to the extent implied by these provisos, particularly the first.

I think it will be difficult for any one, after a careful reading of the act of incorporation, to say that the corporation had not power to engage in any business, or do any act or thing that the members of it might or could do as individuals; that is, any lawful business or any lawful act or thing, except that, in improving its water power or water powers on its property at the Falls of St. Anthony, it should be subject to the restrictions contained in, or implied by, the two provisos. If the corporation had undertaken to run or navigate a line of balloons from the Falls of St. Anthony to San Francisco, and the notes on which this action is brought had been given by it for gas to fill them, (I mean the balloons,) I do not see any thing on the face of its charter which could justify the corporation in saying that it had not power to buy the gas or make the notes.

Considering that the charter does not specify the purpose or object of the corporation, and considering the extraordinary express general grant of power, cases like *Mott v. Hicks*, (1 Cowen, 513,) *Baker v. Mechanic Fire Insurance Company*, (3 Wend. 94,) and *Moss v. Averell*, (10 N. Y. Rep. 449,) holding that corporations, unless expressly prohibited, have implied power to give and indorse promissory notes for the purpose of carrying on their legitimate charter business, can hardly be said to be pertinent on the question of power in this case; certainly they are not necessary to show that the St. Anthony Falls Water Power Company, on the face

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of its charter, had power to make the notes in question. As it would probably be difficult to find any precedent for such an extraordinary act of incorporation, it would probably be difficult to find any reported case on a like question of power.

Second. Had Richard Chute, the agent, as between him and the corporation, power to make the notes for the corporation? Another extraordinary feature of the charter of the corporation is, that upon its organization, by the fifth section of the act, the stockholders were expressly authorized to elect an agent for the transaction of the business of the company, who should reside within the territory of Minnesota, and have such power and authority to transact the business of the company as it should delegate and authorize; and it was, among other things, also provided by this section, that if the power of attorney to the agent was general, the company should be bound to whatever extent the agent should assume to act. Chute was duly elected agent under the provisions of the charter, and a resolution passed as to the powers to be delegated to him as such agent, by which resolution he was to have full and complete authority "to do any and all acts of whatsoever nature, in behalf of the St. Anthony Falls Water Power Company, which he deems best for its interests, or that may be necessary to protect the same, except that he shall not be authorized to sell the fee simple to any water power owned or that may hereafter be acquired by said company."

The power of attorney which was given to Chute in pursuance of the resolution, after authorizing him "to take charge of, manage and transact all business affairs and concerns, connected with the real and personal estate and property, water right, privileges and appurtenances belonging to the Saint Anthony Falls Water Power Company, wherever situate, that they do now or may hereafter own," to contract for the improvement and sale and leasing thereof, to receive the consideration money of the sales and the income of the property, and to execute and deliver for the company all ne-

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cessary contracts, deeds, or other instruments, authorizes him "generally to do all other acts and things for and in behalf of said company he may deem proper to further and protect their interests;" but this general power is followed by a proviso that Chute shall not be deemed authorized to sell the fee simple to any of the water power owned, or that might be acquired by the company.

Now, considering the broad grant of power by the charter, the provisions in it with reference to the election of an agent and his powers, and the broad terms of the resolution in pursuance of which the power of attorney was executed, it appears to me that there is no reasonable ground for saying that the agent had not, under his power of attorney, all the power the corporation had under its charter, except that he could not sell the fee simple of the water power. If the words of general authority in the power of attorney had been to do all other acts and things about or relating to the business of the company, or even to transact generally any or all business, or other business of the company, there might possibly have been a doubt whether the agent would have been authorized to make and indorse notes for the company; but the words are as broad as the words of the charter and of the resolution, "to do all other acts or things &c. that he may deem proper," &c.

I think it must be deemed that the corporation intended to give the agent discretionary power to do any act or thing it had power to do, except to sell the fee simple of the water power.

I am inclined to think the power of attorney should be considered to be general, and within the provision of the charter, declaring that if the power of attorney should be general, the company should be bound by the acts of the agent, "to whatever extent the said agent assumes to act."

Keeping in view the charter and the resolution, it appears to me that there is no reasonable ground for holding that the general authority by the power of attorney was intended

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merely to authorize the agent to do all other acts and things necessary or proper in doing the acts and things previously specially authorized.

Chute was not only the agent, but also one of the three directors, and the secretary and treasurer of the company. One of the directors resided in the city of New York, and one half the capital stock was held by residents of New York. These facts, which appear from the evidence, tend to confirm the broad construction which I have given to the power of attorney, for they tend to show that the corporation would be likely to vest its agent with all the power that it had.

Third. But I question whether the corporation could set up, as against the plaintiffs, that the agent had not power to make the notes. The original notes, of which the notes in suit were renewals, were transferred to the plaintiffs before maturity, and for value. The plaintiffs were not parties to the transactions out of which the considerations for which the original notes were given arose. The plaintiffs were probably bound to take notice of the extent of the charter powers of the corporation, but I question whether they were bound to take notice of the extent of the powers given to the agent, in the absence of any thing suggesting inquiry. Considering the extraordinary general grant of power by the charter, and the provision of the charter authorizing the election of an agent, who might have and exercise all the power of the corporation, I think, in the absence of actual notice to the contrary or any thing to suggest inquiry, the plaintiffs had a right to assume that the agent had power to make the notes. (*See Royal British Bank v. Turquand*, 6 *Ellis & Blackburn*, 327, cited and approved by Judge Nelson in *Commissioners of Knox Co. v. Aspinwall et al.*, 21 *How. U. S. R.* 545, 546.)

If parties will procure and set their agent to work under a charter like this, I do not think they ought to be permitted to allege a want of power on the part of the agent, as to innocent third parties.

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Fourth. I think it was error to refuse to allow the plaintiffs to prove that the agent was in the habit of giving notes for the company, and that he was the only one who gave notes for the company. I do not see how the corporation could say it had not notice of the giving such notes, when the agent was also a director, and secretary and treasurer. I think the evidence was admissible in view of the question as to the construction of the power of attorney, if not upon any other ground.

Upon the whole, I am of the opinion that the plaintiffs could have recovered on the notes in an action against the corporation; that they are evidence of debts owing by the corporation to the plaintiffs; and if so, it seems to follow that the defendant is liable in this action as a stockholder, by the eighth section of the charter.

I think the judgment should be reversed, and a new trial ordered, with costs to abide the event of the action.

Judgment affirmed.

[NEW YORK GENERAL TERM, May 2, 1864. *Leonard, Clarke and Sutherland*, Justices.]

ROBB and others vs. THE ROSS COUNTY BANK and others.

In the absence of any proof that the charter of a bank contains any restriction or limitation on the power of the bank to negotiate or indorse notes or bills of exchange, or on the authority of its cashier to indorse such negotiable paper for the bank, the presumption is that the bank has power, and its cashier authority, to indorse paper of that description.

Though it appears that a bill was indorsed by the cashier of a bank for the mere purpose of collection, or for some other special or limited purpose, such proof will not prejudice or affect the right of a *bona fide* holder for value, before maturity, to recover thereon against the bank; unless it be proved that he took the bill with notice of such special purpose, or under circumstances requiring him to make inquiry as to the purpose of the indorsement. *Per SUTHERLAND, J.*

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Even though the bank had never owned the bill, or had any interest in it, that circumstance will not affect the right of an innocent holder for a valuable consideration, before maturity, to recover against the bank as indorser. *Per* SUTHERLAND, J.

The omission of a cashier, on indorsing a bill of exchange, to write, before or after his name and the name of his office, the words "for the—— bank," will not preclude the holder from recovering against the bank as indorser. An indorsement as follows: "B. P. K., cash'r," will bind the bank of which B. P. K. is cashier.

The case of *The Bank of the State of New York v. The Farmers' Branch of the State Bank of Ohio* (36 Barb. 382) overruled.

APPEAL from an order made at a special term, dismissing the complaint with costs. The action was brought against the defendant, the Ross County Bank, in Chillicothe, impleaded with others, as the indorser of a bill of exchange. The action was tried before Justice CLERKE, at the New York circuit, without a jury. The following facts were found by the justice: 1. That the plaintiffs were, at the times mentioned in the complaint, partners in business as bankers, trading under the name, style and firm of Robb, Hallett & Co., in the city of New York, and that Thomas L. Hallett, one of the plaintiffs, is a resident of the state of New York. 2. That the defendant, The Ross County Bank of Chillicothe, at the times referred to in the complaint, was a corporation. 3. That the Sciota Valley Bank, on the 25th day of April, 1857, made their certain bill of exchange, or draft in writing, in the words and figures following, to wit:

"\$300. *Sciota Valley Bank, Circleville, April 21st, 1857.*

Four months after date, pay to the order of W. W. Bierce, three thousand dollars. Acceptance waived.

S. A. MOORE, Cashier.

To Atwood & Co., New York."

And directed the same to Atwood & Co., in the city of New York, in and by which bill of exchange or draft, they directed the said Atwood & Co. to pay, four months after date, to the order of W. W. Bierce, \$3000, and that acceptance of the said bill of exchange was waived in writing in

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said bill by the said Sciota Valley Bank, the drawers thereof. That the said W. W. Bierce, for value received, and before the said bill of exchange or draft became due and payable, indorsed the same to the Ross County Bank in Chilicothe. 4. That the said bill had and has on the back thereof the following words: "Pay Ross County Bank, in Chilicothe. W. W. Bierce. Pay E. Ludlow, Esq. cashier, or order. B. P. Kingsbury, cashr. Edwin Ludlow, cashr." 5. That the said B. P. Kingsbury was, in August, 1857, cashier of the said Ross County Bank, and that the words "B. P. Kingsbury, cashr," on the back of said bill, are in his proper handwriting. 6. That Edwin Ludlow was, in August, 1857, cashier of the Ohio Life Insurance and Trust Company, and that the words "Edwin Ludlow, cashr," on the back of the bill in suit, are in his proper handwriting. 7. That the plaintiff received the bill in suit before it became due. 8. That the said bill of exchange was, on the 28th of August, 1857, duly presented to the said Atwood & Co., at their office in the city of New York, and payment thereof demanded, which was refused, whereupon the same was duly protested, and due notice of protest was deposited in the New York city post office, August 28, 1857, directed to B. P. Kingsbury, cashier, Chilicothe, Ohio. The justice found the following conclusions of law: 1. That no contract of indorsement by the Ross County Bank, in Chilicothe, had been proved, nor any promise by said bank to pay the amount thereby secured, provided the drawers should not. 2. That it was not proved that the said Kingsbury intended, or was authorized, to bind the bank by any contract of indorsement, or that he had ever made a contract of indorsement on behalf of said bank, or that he did not intend to bind himself. 3. That the complaint should be dismissed, with costs. The plaintiffs asked the court to find, 1st. That the contract of indorsement by the Ross County Bank was proved. 2d. That the indorsement upon the bill was sufficient evidence of a contract of indorsement by the Ross County Bank in Chili-

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cothe. 3d. That Kingsbury, being the cashier of the said bank, was authorized to enter into a contract of indorsement, and that his indorsement on said bill bound the bank as indorser. These requests were denied, and the plaintiffs excepted.

J. S. L. Cummins, for the appellant. I. The justice who tried this case erred in finding, as a conclusion of law, that no contract of indorsement by the Ross County Bank, in Chilicothe, had been proved. (a.) It was proved on the trial that the draft in suit has the following indorsement upon it: "Pay E. Ludlow, Esq. cashier, or order. P. P. Kingsbury, cashr." (b.) It was also proved on said trial that B. P. Kingsbury was the cashier of the Ross County Bank, and that the indorsement on the draft before referred to was genuine; the words "B. P. Kingsbury, cashier," being in said Kingsbury's own proper handwriting. (c.) The cashier of a bank has *prima facie* authority to transfer and indorse negotiable securities, held by the bank for its use and on its behalf. (*Wild v. Passamaquoddy Bank*, 3 *Mason*, 505. *Fleckner v. Bank of U. S.*, 8 *Wheat*. 360. *Story on Agency*, § 114. *Story on Prom. Notes*, § 127, and notes.)

II. If there is any restriction in the charter of a bank, or on the authority of its cashier, by which he is prevented from indorsing negotiable securities, held by the bank for its use, and on its behalf, such restriction must be shown and proved by the bank. (*Wild v. Passamaquoddy Bank*, 3 *Mason*, 505.)

III. No such restriction was proved on the trial of this case.

Mr. Pierrepont, for the respondent. I. The defendant is not liable as indorser. 1. It is not proved that the bank made any agreement with the Trust Company that it would pay the draft if Atwood & Co. did not; that is made no contract of indorsement. 2. The name of the defendant is not on any part of the bill; and the rule is universal that, in order to make a party liable on a bill of exchange, his name

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must appear upon the bill itself. (*Pentz v. Stanton*, 10 *Wend.* 271. *Stackpole v. Arnold*, 11 *Mass. R.* 217. *Fenly v. Stewart*, 5 *Sandf.* 101. *Bolles v. Walton*, 2 *E. D. Smith*, 164.) 3. If the plaintiffs had the right, when they received the bill, to treat any one as indorser, it was B. P. Kingsbury. The word cashier was mere *descriptio personæ*. (*Bolles v. Walton*, *supra*. *De Witt v. Walton*, 5 *Seld.* 571. *Moss v. Livingston*, 4 *Comst.* 208. *The Farmers and Mechanics' Bank v. The Empire Stone Dressing Company*, 10 *Abb. Pr. Rep.* 47. *Taft v. Brewster*, 9 *John.* 334. *Hills v. Bannister*, 8 *Cowen*, 32. *Barker v. The Mechanic Insurance Co.*, 3 *Wend.* 94. *The Marine Bank of the city of New York v. Clements*, 3 *Bosw.* 600. *Scott v. Johnson*, 5 *id.* 223.) 4. The name of the principal not having been disclosed to the plaintiffs when they obtained the bill, if any one is liable it is Kingsbury. (*Dunlap's Paley's Agency*, 3d ed. p. 371. *Brockway v. Allen*, 17 *Wend.* 40. *Waring v. Mason*, 18 *id.* 425. *Mills v. Hunt*, 20 *id.* 431. *McComb v. Wright*, 4 *John. Ch.* 659, 669, and cases *supra*.) 5. The cashier had no authority to make contracts of indorsement for the bank. 6. When a bill appears upon its face to have been executed by an agent, every one taking it must inquire at his peril into the extent of the agent's authority. (*The Farmers and Mechanics' Bank v. The Empire Stone Dressing Company*, 10 *Abb. Pr. Rep.* 47. *Atwood v. Munnings*, 7 *Barn. & Cress.* 278. *Alexander v. McKenzie*, 6 *C. B.* 766. Cases *supra*.) 7. The indorsement purports upon its face to be completed, and every one can ascertain its character by inspection. It would be absurd to say that one has a right to purchase a bill with such an indorsement upon it, relying upon inserting the name of another person who never agreed to become an indorser. In the present case it does not appear that the *defendant* ever agreed or intended to become indorser, or that the plaintiffs took the bill relying upon the defendant being the indorser.

II. The judgment should be affirmed, with costs.

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SUTHERLAND, J. This is a plain case for reversal. The judge who tried the action at the circuit found as a fact, and it was admitted on the trial, that the plaintiffs received the bill of exchange or draft, on which the action was brought, before it became due. There is no evidence or finding tending to show that the plaintiffs were not *bona fide* holders, for value. The presumption is, then, that they were. It was admitted on the trial, and found as a fact by the judge, that the defendant, "The Ross County Bank," was a corporation; that B. P. Kingsbury was its cashier; and that the words "B. P. Kingsbury, cash'r," on the back of the bill, or draft, were in his proper handwriting.

There is no evidence or finding tending to show that the charter of the bank contained any restriction or limitation on its power of negotiating or indorsing notes or bills of exchange, or on the authority of its cashier to indorse such negotiable paper for the bank. The presumption is, then, that the bank had power, and it cashier authority, to negotiate or indorse the bill. (*Marvine v. Hymers*, 2 Kern. 223. *Wild v. Passamaquoddy Bank*, 3 Mason, 505. *Heckners v. Bank of the United States*, 8 Wheat. 360. *Story on Agency*, § 114.)

The judge did not find as a fact, and there was no evidence tending to show, that the bill was indorsed by Kingsbury, the cashier, for the mere purpose of collection, or for any other special or limited purpose; but if this had been proved and found as a fact, it is perfectly clear on principle, and by authority, that such proof or finding would not have prejudiced or affected the plaintiffs' right of recovery as *bona fide* holders for value, before maturity, unless the evidence had also shown that they took the bill with notice of such special purpose, or under circumstances which called upon them to make inquiry as to the purpose of the indorsement.

Even if the Ross County Bank had never owned the bill, or had any interest in it, that fact, if proved and found, would

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not have affected the right of the plaintiffs, as innocent holders for a valuable consideration, before maturity, to recover.

In *The Bank of Genesee v. The Patchin Bank*, (3 Kern. 315,) Judge Denio, after stating and citing cases to show that a mercantile firm, as between the firm and an innocent holder for value, is bound, when the firm name has been affixed by a copartner, to negotiable paper in which the firm had no interest, says: "The same principle applies to the acts of the officers of a corporation." The maxim that when one of two innocent parties must suffer from the wrongful act of a third, he who put confidence in and enabled such third party to do the wrong, must be the sufferer, requires that the principle of liability stated by the learned judge should apply, (as he says it does,) to the acts of the officers of corporations. Indeed, as a corporation can only act by or through its officers, or agents, it is plain that it is most reasonable and proper to apply such principle of liability to the acts of the officers and agents of corporations.

The simple and only question then presented by the appeal is, did the omission of Kingsbury, the cashier, to write on the back of the bill, before or after his name and the name of his office, the words "for the Ross County Bank," preclude the plaintiffs from recovering against the bank as indorser? In other words, although we know that this bill was indorsed as paper negotiated by banks is usually indorsed, that is by the cashier's writing his name on the back of it, with the addition of the name or designation of his office merely; and although we know that banks deal with the public at large, and that their officers, president, cashier, &c. are generally spoken of, and designated, and dealt with by the name of their office merely; and although we must presume that the plaintiffs, when they took the bill, knew that there was such a bank as the Bank of Ross County, and that B. P. Kingsbury was its cashier; and although we know that corporations, from their very nature, can act only through or by their officers or agents; yet, is there any tech-

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nical, unbending rule of law, which compels us to hold in this case, that the indorsement of the bill, by Kingsbury, the cashier, writing his name with the addition of the name or designation of his office, on the back of it, was not the indorsement of the bank, and did not bind the bank as indorser? I should be sorry to think that there was, and believe there is not.

It appears to me that Judge Denio shows conclusively in his opinion in *The Bank of Genesee v. The Patchin Bank*, (3 *Kern. supra*,) that an indorsment like the one in question in this case, binds the bank. The point cannot be said to have been decided in that case, for it appears from the report of it, that the point was not passed upon by the court; but it appears to have been decided in *Folger v. Chase*, (18 *Pick.* 63,) that such an indorsement by the cashier sufficiently showed that it was made in behalf of the bank; and if that was not sufficiently certain, that the plaintiffs had a right to prefix the name of the corporation. (See also *Bank of Wateroliet v. White*, 1 *Denio*, 608; and *Marvine v. Hymers*, 2 *Kern. supra*.)

It would not be reasonable to apply the general rule that to make an individual liable on a bill or note, his name must appear on the bill or note, to banking corporations; because corporations cannot write, or do any other act, except by or through an officer or agent, and because any one taking a bill or note indorsed by a cashier of a bank, in his official capacity, would assume, and have a right to assume, in the absence of any thing suggesting doubt or inquiry, that the indorsement was made in behalf of the bank, and by the authority of the bank.

We ought not to consider the decision of the general term of this district in the case of *The Bank of the State of New York v. The Farmers' Bank of the State of Ohio*, in 1862, (36 *Barb.* 332,) as a controlling authority, for I understand that decision to have been reversed by the court of appeals; and besides, we must presume that when that decision was

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made, the court were not aware that the same point had been decided in more than one case, directly the other way, by the general term of the same district.

The judgment appealed from should be reversed, and a new trial granted, with costs to abide the event.

LEONARD, J. I concur. The court of appeals have sustained the law as declared in the above opinion, at the last term, in an analogous case, decided since the opinion of Judge Sutherland was written.

GEO. G. BARNARD, J. also concurred.

New trial granted.

[NEW YORK GENERAL TERM, May 2, 1864. *Sutherland, Leonard and Barnard*, Justices.]

WYLIE vs. KELLY, Sheriff, &c.

M. & C. being indebted to W. sold him a bill of goods, the price of which was not applied by receipt or otherwise to the debt, nor was there any proof of an agreement that it should be so applied, but on the contrary it appeared from the bill of parcels that the purchaser was to give a note at ten months, payable to his own order; *Held* that there was no payment of a part of the purchase money which would take the case out of the statute of frauds.

An agreement was made by M. & C. to sell a lot of goods in store to W.; a record of the sale was made, in M. & Co.'s book of original entries; a bill made out and delivered or sent to W.; the goods were set out, by themselves, on one side of the store, and an account taken of them; and W. consigned them to D. for sale on his account. *Held* that there was sufficient evidence of delivery and acceptance to go to the jury; and that the question of delivery should have been submitted to them.

THIS was an action to recover the possession of personal property consisting of 187 pieces of printed cotton flannels. The defendant justified the taking, as sheriff of the city and county of New York, under and by virtue of an execution issued out of the Marine court in an action brought by Vincent

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Tilyou against Thomas Munroe and Thomas J. Davis ; and alleged that the said goods, at the time they were levied on by him, were the property of the said Munroe and Davis, jointly, or of Thomas Munroe individually, or that they jointly or severally had an interest therein liable to levy and sale under execution. On the trial Edward N. Mason, a witness for the plaintiff, testified that in 1861 he was clerk to T. Munroe & Co., at 40 Barclay street, New York ; Mr. Wylie had been carding goods for them eight or ten years ; he resided at Paterson, New Jersey, and had a factory there ; T. Munroe & Co., sent goods to Wylie to card, which afterwards went to the dyer or finisher ; the account had always been in favor of Wylie ; at the end of 1860 the balance was upwards of \$6000 ; between December, 1860, and February, 1861, nothing had been paid of any consequence ; the account was cash, and he drew at sight when he pleased ; witness remembered no drafts after January 1, 1861 ; previous to to 1st of March, 1861, there was a transaction between the parties ; on the 25th of February there was a sale of goods ; a record was made in Thomas Munroe & Co.'s book. This book, called the waste book, was shown to the witness, and identified as belonging to T. Munroe & Co. On the fifty-third page was an entry, under date of February 25, 1861, of a sale of 875 pieces of cloakings and flannel cloth, amounting to 36,750 yards, to Geo. Wylie, the plaintiff, at ten months, for \$5033.72. The witness being asked why Wylie did n't take the goods away, said, "I don't know ; Wylie had no store in Paterson, the proper market for such goods is New York ; Wylie bought all of this class of goods that we had in the store ; they were set out on one side of the store by themselves, and an account taken ; Wylie afterwards consigned them to Thomas J. Davis, agent, for sale ; he was agent for his father ; Mr. Davis has been there ever since, and is there now ; while the goods remained in the store, a portion of them were taken by the sheriff ; I think he took 180 pieces of the cloakings ; these were printed cotton flannels,

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used for lining and called cloakings." It was proved that at the time of this sale, a bill of parcels was made out by Munroe & Co., and delivered to Wylie, which stated the terms to be ten months; note to his own order. It was proved that the sheriff removed those goods from the others, but left them in the store, and left a keeper with them.

The witness Mason, being cross-examined by the counsel for the defendant, testified: "The sheriff levied on part of the first lot mentioned in this bill; Mr. Wylie was in New York on the 25th or 26th of February; Philip J. Munroe was the book keeper of T. Munroe & Co.; I had nothing to do with the ledger and journal; I had to do with the waste-book; I don't know whether it is usual in trade to sell goods on credit where the account is overdue; nothing was paid on account at the time; T. Munroe & Co. had ceased to pay their debts; they had not assigned at this time; they made an assignment after this levy; they had ceased for several months before to pay their notes in full; they had got accommodations; I don't know when it was generally known outside that they had stopped; I don't know of their buying any goods after this; they made sales; I entered the employ of Mr. Davis on the 1st April; Mr. Davis was there doing business before that time; the first entry to Thomas J. Davis, agent, is March 18th; I don't know the date of the assignment; it was a week or two after the levy of the attachment in favor of Tilyou." Davis had been one of the firm of T. Munroe & Co. George Wylie, the plaintiff, being examined as a witness, testified, that on the 1st of January, 1861, he received from T. Munroe & Co. an account current which admitted a balance of \$6259.09, to be due to him from them. That on the 25th of February he first spoke with Mr. Munroe about these goods; he had not then heard they had failed; he knew nothing of it till he got a letter telling him the goods were levied on; that Mr. Davis told him he was going out of business; Mr. Munroe said, if his securities turned out as he expected, his estate could pay all liabilities; that they

still owed the plaintiff the balance of this account, \$1200 and odd.

The defendant's counsel then put in evidence the judgment and execution under which the property was levied on by him. It was admitted by the plaintiff's counsel, that this execution was, on the fifth day of March, 1861, levied upon the goods replevied in this action, that is, upon 187 pieces of goods, part of those included in the bill of parcels, made out by T. Munroe & Co. to the plaintiff. It was then agreed between the counsel that in case the defendant was entitled to a verdict, the plaintiff having obtained the possession of the property at the commencement of the action, the amount of the value of the said goods to be assessed by the jury would be the amount of the judgment, sheriff's fees, and interest, in all \$490.12, and that, if the jury found for the plaintiff, his damages would be six cents. The testimony being closed, the defendant's counsel requested the court to direct the jury to find a verdict for the defendant on the grounds: 1st. That there was no note or memorandum of the contract of sale by Munroe & Co. to the plaintiff subscribed by Munroe & Co., nor did the plaintiff accept or receive the goods, or any part thereof, before the levy by the defendant, nor did he, at the time of the alleged sale, pay any part of the purchase money. 2d. That there was no actual delivery of the goods attempted to be sold, or any continued change of possession thereof, and no evidence to go to the jury to rebut the presumption declared by the statute, that the sale was made with the intent to hinder or delay or defraud the creditors of Munroe & Co. The court granted the motion; stating that the decision was made principally on the ground first taken by the defendant, to which decision the counsel for the plaintiff excepted. The jury thereupon, under the direction of the court, found a verdict for the defendant, and assessed the value of the property at \$490.12. The court directed that the exceptions be heard in the first instance at the general term, and judgment be meanwhile suspended.

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Wm. Emerson, for the plaintiff.

Brown, Hall & Vanderpoel. for the defendant.

CLERKE, J. I. I think there was no payment for the goods, to take the case out of the statute. Munroe & Co. undoubtedly were indebted in a large amount, to the plaintiff, at the time of the alleged sale. There was no proof, direct and express, even that the price of the goods should be applied to the debt; and if there was, it would not be sufficient without also showing that the price was actually applied, by receipt or otherwise, to bring it within the exception of the statute. So far from this, it would appear from the bill of parcels that the latter was to give a note at ten months, payable to his own order.

II. Was there evidence enough, relative to acceptance and delivery, to go to the jury? There was an agreement to sell, on the 25th of February, 1861; a record of sale was made, in the book of original entries of Munroe & Co. of the same date; the goods were set out on one side of the store, by themselves, and an account taken of them, I presume, as goods of the plaintiff. The witness Mason, the clerk of Munroe & Co., states, on being asked why the plaintiff had not taken away the goods, that he had no store in Paterson where he lived, and that the proper market for such goods was New York. The same witness states that the plaintiff, after the goods were set apart, on one side of the store, consigned them to Davis, for sale. The plaintiff in his evidence states that when he purchased he meant to send the goods to Kenny & Lockwood for sale; but he was overruled by Mr. Mason (the clerk) and Mr. Davis, who said that Kenny & Lockwood did not sell such goods. Munroe & Co. said they would be able to get better prices, and would sell them on a commission of one per cent, if he would allow them to sell them, and he then consigned them to Davis for sale on their

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premises, who accordingly "had gone on to sell these goods and others."

These were *acts* which may constitute a delivery. I am inclined to think it should have been left to the jury to say, under all the circumstances of the case, whether these acts did or did not amount to a delivery.

The verdict should be set aside, and a new trial ordered; costs to abide the event.

LEONARD, J. The case of *Gray v. Davis* (10 N. Y. Rep. 285) is controlling. The question of delivery &c. must be left to the jury. I concur with Judge Clerke.

SUTHERLAND, J. I should have concurred if the case had shown that the plaintiff requested the question of delivery to be submitted to the jury.

New trial granted.

[NEW YORK GENERAL TERM, May 2, 1864. *Leonard, Clerke and Sutherland, Justices.*]

THE ARTISANS' BANK vs. THE PARK BANK.

Parties residing and doing business in the city of New York, there indorsed and procured to be discounted, a promissory note payable in Alabama. *Held* that the indorsement was a New York contract, and governed by the laws of New York.

By such an indorsement, the indorsers promise to pay the note in New York if, upon its being presented for payment in Alabama, payment is refused and they are duly notified of such demand of payment and refusal.

The case of *Lee v. Sellick* (32 Barb. 522) commented on and explained.

THIS action is to recover from the defendants the amount of a promissory note deposited with the defendants for collection, on the ground of a failure to protest and duly notify the indorsers of non-payment; and also, the costs of an action between the plaintiffs and the indorsers, in which

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action these defendants, although they were notified of the day of trial, and to do so, yet failed to establish that they protested said note, or gave notice of non-payment. The note was made in New York, payable at Mobile; was indorsed over in New York by the payees, a New York firm, to the plaintiffs. Both the parties herein do business in New York. The referee found the following facts, viz: That the parties are banking associations, duly incorporated under the general banking laws of the state of New York, doing business in the city of New York. That on or about the 7th day of March, 1860, one H. J. F. Coleman, for value received, made his certain promissory note in writing, bearing date on that day, whereby he promised to pay eight months after the date, to the order of John Vogt & Co., the sum of \$554.93, value received, at the office of J. W. Olds & Co., at Mobile, state of Alabama. That Coleman thereupon delivered said note to said firm of John Vogt & Co., who thereupon indorsed the note to John Vogt & Co., and transferred the same for a valuable consideration to the plaintiffs. That said note was a good and valid security in the plaintiffs' hands against each and all of the parties, maker and indorsers of said note. That the plaintiffs thereupon, on or about the 19th day of October, 1860, indorsed and transferred the said note to the defendants for collection. That when said note became due and payable, the defendants so held said note and presented the same for payment, as in said note directed, and demanded payment thereof, which was refused, and said defendants failed to duly protest the same, or to notify the several indorsers, or either of them, of the non-payment of said note. That by reason of said failure to protest said note, or to notify the indorsers on the same, or either of them, the plaintiffs have lost their recourse to and upon the firm of John Vogt & Co., and have been and are wholly unable to hold said firm as indorsers of said note, or to collect the same from said firm. That on or about the 19th day of January, 1861, said firm of John Vogt & Co. sued these plaintiffs for

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a balance of money held by them on deposit. That the plaintiffs set up as a counter-claim to the said action, that the said firm were indorsers upon the aforesaid note, and that said note was past due and had not been paid, and claimed to deduct the amount of said note from the moneys so held on deposit. That Vogt & Co. replied to said defense, that the note was not duly protested for non-payment, and that no notice of non-payment, or of any protest thereof, had ever been given to them. That such proceedings were thereupon had that judgment was rendered in favor of said John Vogt & Co., and against these plaintiffs, by which the plaintiffs were compelled to lose, and did lose, the amount of said note, together with costs, amounting to \$97.31. And the referee found as conclusions of law: That the plaintiffs were entitled to recover from the defendants the amount of said note, viz. \$554.93, with interest from the 10th day of November, 1860, and were entitled to have judgment rendered in their favor for said \$554.83, with interest thereon from the 10th day of November, 1860, besides their costs and disbursements of this action. But that the plaintiffs were not entitled to recover from the defendants the sum of \$97.31, claimed for costs in this action by John Vogt & Co. against these plaintiffs. It was claimed, on the trial, that the Alabama statutes did not require the indorser of such a note as this to be notified of non-payment, because the note was not payable at a bank or private banker's. It was also contended that the note was not a negotiable promissory note; and therefore the indorsers were guarantors, and not indorsers. From the judgment entered on the report the defendants appealed.

Townsend & Hyatt, for the appellant.

A. Prentice, for the respondent.

By the Court, SUTHERLAND, J. The indorsement of John Vogt & Co. was undoubtedly a New York contract, and governed by the laws of New York.

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By their indorsement, made in New York, John Vogt & Co., in effect, contracted to pay the note in New York, if upon the note being duly presented for payment at the office of J. W. Olds & Co., at Mobile, payment was refused, and they were duly notified of such demand of payment and refusal. (*Aymar v. Sheldon*, 12 *Wend.* 439. *Everett v. Vendryes*, 19 *N. Y. Rep.* 436. *Cook v. Litchfield*, 5 *Selden*, [9 *N. Y.*] 290.)

The decision in *Lee v. Selleck*, (32 *Barb.* 522,) was probably right, because probably on the facts found, the indorsement in that case was properly considered as made in New York; but so far as any thing was said in the opinion in that case, to the effect that if the indorsement was made in Illinois, it was a contract, in default of payment by the maker, to pay to the holder or indorsees in New York, the opinion is erroneous.

The contract of indorsement is undoubtedly a contract to pay where the indorsement is made.

What was said in any way inconsistent with this, in *Lee v. Selleck*, was said inadvertently, or at least without sufficient attention to the cases, and perhaps to principle. I say this with less hesitation, because I wrote the opinion in that case.

If the indorsement of John Vogt & Co. was a New York contract, it would seem to follow that the judgment in the principal case was right and should be affirmed, for the defendants admit by their answer that they assumed the duty of collecting the note for the plaintiffs; and ignorance of the law on their part, or on the part of their agents at Mobile, cannot excuse the omission of protest and due notice of non-payment to John Vogt & Co., the indorsers.

The judgment should be affirmed with costs.

[NEW YORK GENERAL TERM, May 2, 1864. *Leonard, Clarke and Sutherland, Justices.*]

KELLY, Sheriff &c., vs. CRAPO and others.

It is now the settled law of this state that a prior assignment in bankruptcy, or under insolvent proceedings, in a foreign nation, or in another state of this union, will not be permitted to prevail against a subsequent attachment of the bankrupt's or insolvent's effects by a creditor residing here. Such an assignment will be regarded by the courts of this state as operating to transfer all the property of the bankrupt or insolvent situated, at the time of the assignment, within the territory, or being under the dominion, of the nation or state where the proceedings were instituted.

But such an assignment will not transfer to assignees appointed in insolvent proceedings instituted in another state of this union, the title to a vessel registered there, and on the high seas, at the time, as against a subsequent attachment sued out by a creditor residing here. SUTHERLAND, J. dissented.

That comity which should exist and be liberally practiced between all civilized nations, and more especially between sister states, forbids that our courts should go any further than they have already gone, in giving a preference to the claims of creditors of the bankrupt or insolvent, who are citizens of this state, in respect to property actually here.

The preference should not be extended in respect to property not within our jurisdiction at the time of the assignment, merely because it was not actually within the territorial limits of the other state, although virtually under the dominion of her laws as property.

THIS action was brought upon a bond given pursuant to 2 *R. S. 1st ed.*, p. 5, § 14, for the purpose of procuring the discharge from an attachment of an undivided half of a certain ship or vessel called the *Arctic*. Under insolvent proceedings instituted in the state of Massachusetts, Gibbs, Jenney & Allen were declared insolvent, and the defendants were duly appointed assignees. The insolvents made an assignment to them, of all their property, among which was the vessel in question, which was on the high seas at the time, and of which they owned one half. The vessel subsequently coming to New York was seized by the plaintiff on the 30th of April, 1861, under an attachment issued against Gibbs, Jenney & Allen, as non-residents, at the suit of Mott Robinson, a creditor residing here. The defendants, claiming to hold the vessel under and by virtue of the assignment, made application, as provided by the revised statutes in such cases,

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for an appraisement of its value. It was accordingly appraised at \$3000, and the vessel was released from custody, and delivered to the claimants, upon their executing to the sheriff, with the defendants Williams and Minturn, as sureties, the bond required by the statute, conditioned that in a suit to be brought on said bond, the claimants would establish that they were the owners of the share of the vessel attached, at the time of its seizure; and in case of their failure to do so, that they would pay to the sheriff the amount of the valuation, with interest from the date of the bond. The attachment was never set aside or discharged, and Robinson, the attaching creditor, proceeded in the original action, and recovered judgment for the whole amount claimed, against Gibbs, Jenney & Allen, upon which execution was issued, which remains in the hands of the plaintiff, wholly unsatisfied.

Both sides having rested, a verdict was taken for the plaintiff by consent, for the amount of the bond and interest, subject to the opinion of the court at general term. The plaintiff accordingly made a case, upon which he moved for judgment on said verdict.

Joseph H. Choate, for the plaintiff.

C. C. Langdell, for the defendants.

CLERKE, J. There seems to be no dispute as to the facts, and very little as to the law of this case.

The defendants claim the property attached, as assignees duly appointed in insolvent proceedings in Massachusetts, in which Gibbs, Jenney & Allen were declared insolvent, and that these latter, at the time of taking the proceedings, were the owners of the property attached. The vessel belonged to the port of Fairhaven, in Massachusetts, and was there registered, as to one-half in their hands, being the interest attached here. The claim of the defendants was founded exclusively on two assignments, dated respectively 12th Feb-

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ruary and 6th March, 1861, under the insolvent proceedings; and no assignment was voluntarily made to them by the insolvents themselves. The vessel (called the Arctic) was an American ship, and daily registered as such in the said port, and at the several dates when the assignments were executed, and when they took effect, she was on the high seas prosecuting a voyage from Baker's and Howland's islands in the Pacific ocean to the port of New York, where she arrived on the 30th of April, 1861, on which day she was attached by the plaintiff as sheriff. It is not, I believe, disputed, that it is now the settled law of this state, that a prior assignment in bankruptcy, or under insolvent proceedings, in a foreign nation, or in another state of this union, will not be permitted to prevail against a subsequent attachment by a creditor of the bankrupt's or insolvent's effects residing here. Neither is it disputed that such an assignment will be regarded by the courts of this state as operating to transfer all the property of the bankrupt or insolvent, situated, at the time of the assignment, within the territory, or being under the dominion of the nation or state, where the proceedings were instituted; for instance, if the proceedings under which the assignments in question were conducted had been instituted in the united kingdom of Great Britain and Ireland, and the vessel was a registered ship of that nation, the assignment would have transferred her to the assignees, although she was, as in the present case, on the high seas at the time.

But, it is maintained by the counsel of the plaintiff, that Massachusetts has no jurisdiction on the high seas; that the ships belonging to her ports are only known when they have left her ports as American, and not as Massachusetts vessels, and that, therefore, the laws of Massachusetts should not be regarded as operating upon them. As Massachusetts cannot be said to have any jurisdiction over them, they should not be held to be within the operation of her bankrupt or insolvent laws. Undoubtedly, no single state of this union has any jurisdiction, in this sense, beyond its territorial limits. It

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is, indeed, in a very high and a very important sense sovereign and independent; it is, in short, a nation in relation to its domestic polity and laws, comprehending the widest and highest sphere of governmental action; it is not a nation in relation to foreign governments or for international purposes. If any crime was committed on board the vessel in question, while she was on the high seas, the perpetrators of it would be answerable to the laws of the United States, and not to those of Massachusetts; or if her officers committed any wrong affecting the vessels or other property of any foreign nation, or if they suffered any wrong affecting the vessels or other property of any foreign nation, or if they suffered any wrong from the authorities of a foreign nation, the government of the United States, and not of Massachusetts, would be the instrumentality by which satisfaction would be afforded in the one case, and redress demanded in the other.

Nevertheless, although for the more convenient and efficient administration of justice and for the purpose of all intercommunication and transactions with foreign governments, the vessel is properly called an American ship, she remains Massachusetts property, under the command and control of citizens of Massachusetts, and a portion of the general wealth of that state, subject to her laws. Strictly speaking, as property, she should be deemed more a portion of the wealth of the state than of the union, and as such property more subject to the jurisdiction and laws of the former than of the latter. Her officers and crew, indeed, are, as we have seen, subject, as to their conduct while on the high seas, to the criminal laws of the union; and the flag of the union betokens her national character. But this does not deprive Massachusetts of precisely the same control over her as property, which the laws of that state allowed and prescribed before she left the port from which she took her departure on her voyage to the Pacific ocean.

Perhaps, however, these observations and this course of inquiry have little or no relevance in aiding a correct conclu-

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sion on this occasion. After all, this is a mere question of comity between sovereign states. We are under no obligation to recognize the transference *in invitum* of any property made under the laws of other jurisdictions. We could, if we thought proper, disregard all such assignments, and resolve that they should have no efficacy in this state, whether the property was or was not situated within the territory, or under the control or jurisdiction of the state or nation in which the assignment was made. But we have chosen, thus far, to give a preference to the claims of creditors of the bankrupt or insolvent, who are citizens of this state, in respect to property actually here. Is not this sufficient? Shall we extend this preference in respect to property not within our jurisdiction at the period of the assignment, because it was not actually within the territorial limits of the other state, although virtually under the dominion of her laws as property? Shall we take advantage of the mere fact that it happens to be beyond her territorial limits at that period, although not within our own, and thus, in a case presenting no substantial ground of distinction, refuse to recognize her jurisdiction? I do not think this would be generous, or courteous even, on our part. That comity which should exist, and be liberally practiced between all civilized nations, and more especially between sister states, forbids that we should go any further than we have already gone in cases of this description. The line of demarcation in relation to this subject should be between property actually within our limits at the time of the assignment, or insolvency, or bankruptcy, and property not actually within our limits. There is a good reason for sustaining the preference of creditors resident in our state in respect to property situated within its limits at the time of the assignment. Comity towards other sovereignties does not require of us to go so far as to deny or ignore such a preference; for it may, with considerable plausibility, be assumed that the credit was obtained in this state in consequence of the debtor's having property

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here. At least, it may be assumed that this was some inducement to the person who gave the credit; at all events, there was nothing grasping, nothing inconsistent with comity in retaining the property of the debtor situated here at the time of the act of bankruptcy or insolvency, for the benefit of the creditors residing here. But, beyond this, I repeat, it would be both discourteous towards a sister state, and incompatible with our own dignity to give the preference any greater effect, and take advantage of the fact that a ship belonging to Massachusetts was prosecuting her voyage on distant seas, and insisting that she could not be deemed a Massachusetts ship, because, under the federal compact between Massachusetts and her sister states, she had not a Massachusetts, but an American flag on her mizzen yard.

Whatever Massachusetts may have done in respect to the insolvent laws of other states, her conduct is no reason why we should imitate her discourtesy or illiberality. In the administration of our laws, if we had only to do with Massachusetts, we may be justified in retaliating; but, as we have to adopt general rules, we must shape our course according to the broad dictates of comity and liberality towards all sister states alike.

In conformity with these considerations, I am of opinion that there should be a judgment dismissing the complaint with costs.

LEONARD P. J. The rule of law that transfers of property under foreign insolvent or bankrupt proceedings, are void as to domestic creditors, applies only to property within this state at the time of the transfer.

The property seized by the sheriff in this case was on the high seas at the time of the insolvent proceedings in Massachusetts. If the vessel first reached a port there, or in New Jersey, the principal referred to could not be applied, to maintain the plaintiffs' case. I am unable to perceive any reason for holding that the transfer was inoperative while the

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vessel was not in any port. It would be an unreasonable extension of a severe rule of law to hold the transfer void or inoperative under such circumstances.

In the case of *Moore v. Willett, sheriff*, (35 Barb. 663,) Judge Ingraham referred to the fact that the vessel was on the high seas, as affording an additional reason for sustaining the title of an assignee, under a voluntary assignment for the benefit of creditors, made in North Carolina, containing provisions which were lawful there, but against the policy of the law as adjudged in the courts of New York. The fact referred to did not control the decision of that case, but the reason is fully applicable here, and ought, I think, to be controlling.

I concur in the opinion of Judge Clerke.

SUTHERLAND, J. I dissent. No doubt the statutory or involuntary bankrupt proceeding passed the title to the property, as between the bankrupt firm and the assignees; but I cannot see why the well settled principle, that the courts of this state will not recognize and give effect to such a proceeding as against New York creditors, ought not to control our decision of this case. No matter where the vessel was when the statutory assignment was made; she came here subsequently, and I think the New York creditor should have the benefit of the well settled principle referred to.

Judgment dismissing the complaint.

[NEW YORK GENERAL TERM, May 2, 1864. *Leonard, Clerke and Sutherland, Justices.*]

LAURA A. BUSKIRK, adm'r &c., vs. CLEVELAND.

A lease, not purporting to reserve to the lessor the products of the farm, but merely providing that the lessor shall have a lien as security for the rent, upon all the goods, wares, chattels, implements, fixtures, tools and other personal property which are or may be put upon the demised premises, if it could be construed a chattel mortgage, would be void for uncertainty; as not identifying any particular property, so that it can be known to what it was intended to apply.

Where a tenant agreed by parol, with his lessor, that he would turn out hay and grain to secure the payment of the rent reserved in the lease, if the lessor was afraid that she would not get her pay; the value of the property being over fifty dollars, and nothing being paid, and no receipt or credit actually given, or possession delivered; *Held* that the transaction rested in words merely, and no title passed.

APPEAL from a judgment of the county court of Steuben county, affirming the judgment of a justice of the peace. The action was brought to recover the value of a quantity of hay. On the 18th day of November, 1858, the plaintiff leased to one Austin Rollins seventy-five acres of land situated in the town of Hartsville, the residence of Rollins, for two years from December 1, 1858, for \$63 per year, payable on the first days of December, 1859 and 1860. The lease contained the following clause, called a mortgage clause: "And it is hereby agreed that the said party of the first part shall have a lien, as security for the rent aforesaid, upon all the goods, wares, chattels, implements, fixtures, tools and other personal property, which are or may be put on the said demised premises, and such lien may be enforced on the non-payment of any of the rents aforesaid, by the taking and sale of such property in the same manner as in cases of chattel mortgages." Such lien to be enforced by a taking and sale, as in cases of chattel mortgages; but neither the lease nor a copy was ever filed in the town clerk's office as a chattel mortgage. The hay in question was cut on the place by Rollins, and put in the barn on the place. An execution was issued and received by the defendant as a deputy sheriff of Steuben county, on the 12th day of September, 1859, upon a judg-

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ment recovered in the Supreme Court, against Rollins in favor of Charles Oliver, for \$306.89, in 1858; but the levy on the hay was not made until the 25th of October, 1859. On the 10th day of November, 1859, another execution was issued to the defendant, as such deputy, against Rollins in favor of one Burgher. The defendant also justified under a chattel mortgage executed by Rollins to David Conderman, July 13, 1859, upon the hay, which mortgage was duly filed. The mortgage was admitted by the plaintiff, on the trial, to have been given for a valuable consideration, in good faith, without any intent to hinder, delay or defraud creditors. On the 15th day of October, 1859, a parol agreement was made between the plaintiff and Rollins, that the latter should turn out hay and buckwheat then in the barn, to secure the plaintiff on the lease for rent, if she was afraid that she would not get her pay. This agreement was unaccompanied by any acts of delivery of possession of the hay, and there was no relinquishment of any part of the plaintiff's debt, and no prior security parted with.

On the trial in the justice's court, the jury found a verdict in favor of the plaintiff, for the value of the property; and the county court affirmed the judgment.

Bemis & Stevens, for the appellant.

F. C. Dinenny, for the respondent.

By the Court, JOHNSON, J. The plaintiff acquired no title to the hay in question by virtue of the provision in the lease giving her a lien upon the personal property which then was or might be afterwards put upon the demised premises. It does not purport to reserve the products of the farm, but provides only that the lessor "shall have a lien as security for the rent aforesaid, upon all the goods, wares, chattels, implements, fixtures, tools and other personal property, which are or may be put on the said demised premises." If

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this clause could be construed a chattel mortgage, it would be void as against judgment creditors, as it was never filed as such in the town clerk's office. And as a chattel mortgage I incline to the opinion that it would be void for uncertainty. It does not identify any particular property, so that it could be known to what it was intended to apply. (*See 3 Am. Law Reg. N. S.* 31, 32 &c.) But it is not even a chattel mortgage. It contains no words of sale, and evidently was not intended to transfer the title to the chattels, at the time of the execution of the instrument. (*Milliman v. Neher*, 20 Barb. 37, 40.)

It is equally clear, I think, that the plaintiff acquired no title to the hay by virtue of the agreement to purchase and apply the value, or proceeds, upon the rent. The price was not definitely fixed. But if it had been, the transaction rested in words merely, until after the levy. The value of the property was over fifty dollars, and nothing was paid, and no receipt or credit actually given. Clearly no title passed. (*Brabin v. Hyde*, 30 Barb. 265, and cases there cited.) The sale by virtue of the executions being valid as against the plaintiff, it is unnecessary to determine whether the chattel mortgage to Conderman was subject to the lease, or otherwise. The judgment of the county court and that of the justice must be reversed.

[MONROE GENERAL TERM, December 7, 1868. *E. D. Smith, J. C. Smith and Johnson*, Justices.]

COE vs. MASON and COE, adm'rs &c.

Section 110 of the code of procedure, which requires that a promise, to take a case out of the operation of the statute of limitations, shall be in writing, is not applicable to cases where the right of action had accrued previous to the adoption of the code.

Accordingly *held* that parol promises made in 1851 and 1856, to pay a debt which existed and was in full force at the time the code took effect in 1848,

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were sufficient to take the case out of the statute of limitations; the case coming within the exception of section 78 of the code. MORGAN, J. dissented. The legislature intended to confine the operation of section 110 of the code to new liabilities, and not to include pre-existing ones which had been already barred by the statute. *Per* FOSTER, J.

The "right of action," spoken of in the 78d section of the code, which excepts from the operation of section 110 actions already commenced, and cases "where the right of action has already accrued," means the right of action upon the original obligation, and not the right of action upon the new promise.

The case of *Van Allen v. Feltz*, (82 Barb. 189,) overruled.

A PPEAL from a judgment rendered in favor of the plaintiff upon the report of a referee appointed pursuant to section 41 of the revised statutes. (3 R. S. p. 175, 5th ed.) The plaintiff claimed upon a promissory note, and upon an account for work, labor and services performed by her for the defendants' intestate. The referee reported the following facts found by him, viz: That William C. Coe died in March, 1859, and that the defendants were duly appointed administrators of his goods, chattels and credits. That in the month of June, 1843, he executed and delivered to the plaintiff a promissory note of which the following is a copy: "\$100. Due Ruth Coe, or bearer, one hundred dollars one year from date with interest, for value received.

Madison June 20, 1843.

(Signed)

WILLIAM COE."

That William C. Coe, in the year 1851, promised the plaintiff, by parol, to pay the note; and that he also, in the year 1856, promised her, by parol, to pay the note. That the note, principal and interest, on the 10th day of August, 1860, amounted to \$219.97, and that no part of the principal or interest had been paid. All of which findings were supported by the evidence. And as a conclusion of law, the referee found that the note was a valid subsisting debt against the defendants as such administrators, in favor of the plaintiff, with interest from its date.

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J. Sterling Smith, for the plaintiff.

A. N. Sheldon, for the defendants.

FOSTER, J. The only question is whether the demand is barred by the statute of limitations. It is conceded that but for section 110 of the code the debt secured by the note in question was revived by the parol promises of the intestate, made in 1851 and 1856. That section is a part of title 2, and declares that "no acknowledgment or promise shall be sufficient evidence of a new or continuing contract whereby to take the case out of the operation of this title, unless the same be contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest." And section 73 of the same title provides that "this title shall not extend to actions already commenced, or to cases *where the right of action has already accrued*; but the statutes now in force shall be applicable to such cases, according to the subject of the action, and without regard to the form."

The adjudications of the supreme court upon this question cannot be reconciled. The case of *Gillespie v. Rosekrants*, (20 Barb. 35,) is in point to show that the claim is not affected by section 110, and the case of *Winchell v. Bowman*, (21 Barb. 448,) is substantially to the same point; while the case of *Van Alen v. Feltz*, (32 Barb. 139,) holds directly the reverse; and it is claimed by the counsel for the appellants that other cases, cited by him, favor the same view.

It is apparent that the case of *Van Alen v. Feltz* was decided before the decision of the court of appeals in the case of *Winchell v. Hicks*, (18 N. Y. Rep. 558,) was promulgated.

Without attempting to analyze the various cases, it is sufficient to say that the decision of the court of appeals in the last mentioned case is controlling; and I think it meets the question raised here, and decides that section 110 does not apply to such a case. The questions were not raised in

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that case, whether the payment made by Bowman, with the parol proof of what was said by Hicks and Tanner, to the plaintiff's agent, showed the payment to be their act; and also what was said by them to him, was evidence of an acknowledgment by them of the existence of the debt; so that, independent of the payment, it continued the demand in life.

It appears clearly, from the case, that Allen, J. who wrote the opinion, held not only that the payment was sufficient to take the case out of the statute, as to Hicks and Tanner, but that section 110 did not apply; and that the acknowledgment was also sufficient for that purpose. Denio J. dissented from so much of the opinion as held that the payment was good as against all of them; but said that the language of Hicks and Tanner was sufficient to take the case out of the statute, and that the code had no application to the case. Johnson, J. also put his judgment on the verbal recognition. It is also apparent from what the case discloses that Comstock, J. put his decision on the same ground. And the legal presumption is that all the other judges concurred in all the legal conclusions of the opinion. In that case the debt had been due about two years when the code took effect; and in the case before us it had been due about four years; and if the decision that the code had no application to that case be correct, it surely cannot apply to this.

I think, however, that the language of section 73 is so plain that there should not be any doubt that it meant to exclude from the operation of section 110 all cases then existing, where a suit had been brought; or where an action could be maintained at the time the code took effect. If the legislature meant to provide that the code and the 110th section should apply to all cases of simple contract, except where suits had been commenced, or where they should be commenced within six years from the time they became due, notwithstanding they were due when the code took effect, they used very inapt language to express the idea, and were engaged in a very useless work; for such cases would not

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need any saving clause. The provisions of section 110 could not apply to them.

The language of section 73 is very broad. It excepts all cases "*where the right of action has already accrued.*" Had not, in this case, a right of action accrued? And is it not to be presumed that the parties, when the note was made, and when payment was delayed, were aware of the provisions of the statute of limitations then in existence, and acted accordingly? If so, no construction should be given to the statute which would change their right, unless it clearly appears that the legislature intended to do so. It is a general principle of construction of a statute, that it is to be so construed as to operate only prospectively, and so as not to affect in any way existing debts, if such construction can be given without doing violence to the language employed.

I believe the legislature intended to confine the operation of section 110 to new liabilities, and not to include pre-existing ones which had already been barred by the statute. And such interpretation is consistent with the language made use of in section 73.

The judgment should be affirmed, with costs.

BACON, J. The note on which a recovery was allowed in this case was payable in June, 1844. The statute of limitations did not attach until 1850. The claimant proved a promise by parol, on the part of the maker of the note, to pay it, made in 1851, and another made in 1856. And the referee has found the fact that these promises were made, and that the note is a valid and subsisting debt against the estate of the decedent. Before the code there can be no doubt that the plaintiff would on this proof be entitled to recover, and the only question is whether the provisions of the code on the subject of promises which will remove the bar of the statute, are applicable to, and control this case. In 1848 the 110th section of the code was enacted, and has been ever since in force, by which it is provided that no

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acknowledgment or promise shall take a case out of the operation of the statute of limitations, unless the same be contained in some writing signed by the party to be charged thereby. But by the 73d section an exception is created in regard to actions already commenced, and cases "where the right of action has already accrued." It is insisted, therefore, that as the cause of action had accrued, and was existing when the code took effect, this case is within the plain exception of the 73d section, and is to be governed by the law in force when the code was adopted, as is expressly provided by that section.

The course of adjudication in this state upon this question cannot be said to be very satisfactory, and decisions in the supreme court in different districts can be found on both sides. The difficulty which has presented itself, and upon which it seems to me there has been an unnecessary refinement, is whether the "right of action" of which the code speaks means the right of action upon the original obligation, or the right of action upon the new promise. It appears to me to be the most obvious and natural conclusion that the former was intended. That is the cause of action which is always prosecuted in a suit on the note. It is the gravamen of the action, and a new promise is never counted upon, although it may be true that where the statute is interposed as a defense, it is the new promise which gives vitality to the cause of action, and without which, indeed, it can hardly be said to exist.

This is the view taken by several of the reported cases in the supreme court, and it seems to me in accordance with a plain and common sense interpretation of the language of the code. I do not deem it worth while to cite or comment upon the cases in the supreme court on either side of the question, since it must be determined, if it can be, independently of their authority. In the court of appeals, the point has not perhaps been nakedly presented, and yet enough has been decided, as I think, to determine the question in favor

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of the right of the plaintiff to recover. The case of *Esselstyn v. Weeks*, (2 Kern. 639,) is not an authority against this conclusion, for the reason that there the statute of limitations had attached to the obligation before the enactment of the code, and consequently there was no existing right of action to be saved at that time. This may perhaps strike some minds as "a distinction without a difference" in principle, but such was the fact in that case, and it is conceded by Hogeboom, justice, in *Van Alen v. Feltz*, (32 Barb. 142,) that the case cannot be considered as authority beyond the range of the facts as they existed, it being a case where the statute of limitations had attached prior to the code.

The case of *Winchell v. Hicks*, (18 N. Y. Rep. 558,) is, I think, in principle and effect decisive of this case. The precise question there was whether a payment made by the principal, upon a promissory note, would operate to take away the bar of the statute set up by the sureties, where such sureties upon being called on by the holder had referred him to the principal, and upon such reference a payment was made. The court held that this was sufficient to charge the sureties and obviate the statute. The question of the proper construction of the 73d section was in the case, and was discussed in the leading opinion, by Allen, J. The question arose, as he says, whether the promise relied upon to take the case out of the statute should not have been in writing, under the 110th section of the code. He gives a two-fold answer to the suggestion, and the second is that the case is within the exception of section 73, for the reason that the original right of action having accrued before the adoption of the code, and the debt not having then been barred, the contract would be revived by a parol promise, and did not require a written acknowledgment. From some part of the opinion there was a dissent by other judges, but not in respect to this proposition, which seems to have been assented to, and was expressly recognized by Denio, J. when he says that the language of the sureties was a sufficient recog-

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nition of their liability under the law as it formerly stood; "*the code*," he adds "*having no application to the case*." The principle is here very clearly announced which should govern this case. The statute did not attach to the note of the plaintiff here until 1850; consequently a right of action existed and the obligation was in full force in 1848, when the code took effect. The case comes within the exception of the 73d section, and the parol promise proved in this case entitled the plaintiff to recover. I think the conclusion of the referee was right, and that the judgment entered upon his report should be affirmed.

MORGAN, J. dissented.

Judgment affirmed.

[ONONDAGA GENERAL TERM, April 5, 1864. *Morgan, Bacon and Foster*, Justices.]

 BENNETT vs. ABRAMS.

Although an oral agreement to exchange one piece of real estate for another is void by the statute of frauds, yet if the parties have executed such an agreement, in part, and the plaintiff has fully performed to the extent of his agreement, and the defendant has accepted and retained all the advantages to be derived from such performance, it will not, after that, lie with him to refuse performance on his part and urge the invalidity of the agreement.

To permit a party to avoid the agreement, under such circumstances, on the ground of its invalidity, would be to make the statute of frauds an instrument of fraud, instead of a shield against it.

Where possession has been taken by both parties under an oral agreement for the exchange of land, and one of them has fully performed on his part, and the fairness of the agreement is not assailed, he may maintain a suit in equity to enforce a specific performance of it by the other party.

An executory contract for the exchange of lands is not merged in the deeds of conveyance. And if one of the parties to such a contract agrees to satisfy and discharge an existing mortgage upon his land, in addition to the execution and delivery of a deed, these are separate and distinct acts, and performance as to one will neither extinguish nor discharge the party's obligation in respect to the other.

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A party who is entitled to a specific performance of an agreement to release his land from the lien of a mortgage may maintain a suit in equity for that purpose, notwithstanding he has, before the filing of his bill, conveyed away the land by deed with warranty.

Form of a judgment or decree for the specific performance of an agreement to satisfy and discharge a mortgage which is a lien upon the plaintiff's land, where no damage has yet been sustained by the plaintiff, and the mortgage is held by a third person, not a party to the action, and is not yet due.

If specific performance be impracticable, then the party may have approximate relief in some other form which will secure to him the substantial advantages of his contract.

APPEAL from a judgment rendered at the circuit, on a trial before the court without a jury. The action was brought to reform a receipt on the ground of a misapprehension of its contents, when executed, and also to compel a specific performance of a verbal agreement. The following facts were found by the judge who tried the cause, viz: 1. That on or about the 20th day of December, in the year 1859, the defendant was seised in fee and possessed of three certain pieces or parcels of land lying in the town of Duaneburgh, in the county of Schenectady, which are particularly described in the complaint. 2. That such premises were subject to the lien and incumbrance of a mortgage executed by the defendant and wife to William Ladd, bearing date on the 1st day of April, 1859, to secure the payment of \$1300 and interest, and which was duly recorded in the office of the clerk of Schenectady county, on the day of its date, in book No. 27 of mortgages, on page 391, &c. 3. That the plaintiff, on or about the said 21st day of December, 1859, was seised in fee and possessed of two lots of land, situated in the town and county aforesaid, which are particularly described in the complaint. 4. That on or about the said 21st day of December, 1859, the said parties entered into a parol agreement to exchange the said lands of which they were respectively seised, as aforesaid. 5. That by the said agreement the plaintiff promised and agreed to sell and convey to the defendant the said two lots of land of which he was so seised and possessed,

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and execute and deliver to the defendant a bond for the sum of \$625, and also a mortgage, as collateral security therefor, upon one of the lots so to be conveyed to the plaintiff by the defendant, as hereinafter stated. 6. That by the said agreement the defendant promised and agreed to and with the plaintiff to sell and convey to him the three several lots of land of which he was so seised and possessed, and also that he would procure or cause the mortgage upon said premises so by him executed to William Ladd, to be satisfied and discharged of record. 7. That on the said 21st day of December, 1859, the parties, in part performance of said agreement, duly executed to each other, respectively, deeds of the said lands so owned by them respectively. 8. That at the same time, in further performance of said agreement, and in conformity therewith, the plaintiff duly executed to the defendant the bond and mortgage for \$625, above referred to. 9. That upon the execution of said conveyances the parties took possession of the premises so to each other respectively conveyed, as aforesaid. 10. That said agreement was not fully performed on the part of the defendant, in that he did not, and has not yet, although often requested so to do by the plaintiff, procured or caused the said mortgage so by him executed to William Ladd, as aforesaid, to be satisfied or discharged of record, but that the same still remains a lien and incumbrance upon the said premises so conveyed by the defendant to the plaintiff and the amount now due thereon is the sum of \$1575. 11. That on the 22d day of February, 1861, the plaintiff signed and gave to the defendant an instrument, of which the following is a copy: "Received, Duaneburgh, February 22d, 1861, of Jay Danforth Abrams, his note for three hundred dollars, payable on the first day of April next, and which note, when paid, will be in full for all bonds, notes, warranties, debts, dues and demands, of whatsoever name or nature the same may be, to the above date. "In presence of John S. Van Aernam. (Signed) JOSEPH BENNETT." 12. That such instrument, and the \$300 note

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therein referred to, were given upon a settlement by the parties of certain mutual demands between them, other than the obligation of the defendant to satisfy and discharge of record the mortgage by him executed to William Ladd. 13. That the plaintiff did not agree nor intend by said settlement to release the defendant from such obligation, nor was such release any part of the consideration of the said note. 14. That the insertion in such instrument of the words "in full of all debts, dues and demands," was obtained of the plaintiff by the defendant by means of fraudulent pretenses. It was therefore adjudged and decreed that the said instrument of release executed by the plaintiff to the defendant, bearing date the 22d day of February, 1861, in nowise discharged or affected the liability and obligation of the defendant to procure or cause the said mortgage so by him executed to William Ladd, upon the premises afterwards conveyed to the plaintiff, to be discharged and satisfied; that the plaintiff was entitled to have a specific performance by the defendant of his agreement to procure or cause the said mortgage to be discharged and satisfied. It was further adjudged and decreed that the defendant should within thirty days procure the said mortgage so by him executed to William Ladd, to be satisfied and discharged of record, or pay to the plaintiff, or his attorneys, the sum of \$1300, being the amount of said mortgage, together with the interest thereon from the first day of April, 1859, to the time of such payment, and also the further sum of \$5 for the costs and expenses of procuring a discharge of record of such mortgage. And it was further adjudged and determined that the plaintiff recover of the defendant his costs and disbursements of this action to be adjusted, and also the further sum of seventy-eight dollars and seventy-five cents, as and for an additional allowance.

T. B. Mitchell, for the appellant.

S. W. Jackson, for the respondent.

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By the Court, BOCKES, J. The facts found and stated by the learned judge before whom the cause was tried are well established by the pleadings and proofs. Most of the material allegations of the complaint are not denied in the demurrer of the defendant. Therefore they stand admitted of record.

It is denied that the defendant agreed to procure for the plaintiff a right of way across the land of Mr. McIntosh. On this point the case is clearly with the plaintiff. He swears that the defendant was to furnish him a right of way through McIntosh's lot. In this he is distinctly supported by both William and Angus McIntosh. Nor does the defendant deny that such was his agreement, except as it stands denied by his answer. Perhaps this is of no great importance in the case, although it seems of some significance in considering what matters were subjects of release, in consideration of the payment by the defendant of the three hundred dollars.

The defendant also denied that the receipt of February 22d was intended as a release of his obligation to procure the right of way, or as a discharge from his liability under the covenant of warranty, by reason of the Marvin Strong claim; but he insisted that the receipt and payment of the \$300 relieved him from his agreement to procure a cancellation of the Ladd mortgage for \$1300. The findings of fact are against the defendant on these issues; and the strength of the evidence is in favor of the conclusions stated in the record.

The testimony of the parties, on this branch of the case, is in direct conflict. But if we consider the obligations of the defendant, the probability of the plaintiff's statement, and unreasonableness of the defendant's, the case is clearly with the plaintiff. It is simply absurd to suppose that the plaintiff would understandingly discharge a responsible party from the payment of \$1300, and himself assume its payment for the insignificant sum of \$300; to say nothing of the further release of other important obligations, for the same and no other consideration. According to the facts admitted

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and proved, there is propriety in the arrangement by which the defendant obtained, in consideration of the payment of \$300, a release from his covenant to protect the plaintiff from the Marvin Strong claim, and from his obligation to procure the right of way. But it is against all reason that the plaintiff would in addition, and with no superadded inducement, release the defendant from a debt of \$1300, and take upon himself the burden of its payment. A release which operates so unjustly, obtained on such gross inadequacy of consideration, has either the taint of fraud or the more charitable presumption of mistake; and it then lies with the party who sets it up as a protection to establish its perfect integrity. This is a case where fraud or mistake might well be inferred from the circumstances attending the transaction; and I am entirely satisfied with the conclusions of fact stated by the learned judge who tried the cause. Even if it were otherwise, the court on appeal could not overhaul the findings, inasmuch as there is evidence to sustain them. It has been very often decided that findings of fact will be held conclusive on appeal, when based on a conflict of evidence, as in this case.

The questions of law remain to be considered.

It is urged that an oral agreement to exchange real property is void by the statute of frauds. This is unquestionably true, and had the agreement in this case remained wholly unexecuted, no legal obligation would have resulted from it. But the parties executed the agreement in part. The plaintiff fully performed to the extent of his agreement, and the defendant accepted and retained all the advantages to be derived from such performance. It did not, after that, lie with him to refuse performance on his part, and urge its invalidity. As was said in *Malins v. Brown*, (4 Comst. 403,) to permit the defendant to avoid the agreement on this ground would be to make the statute an instrument of fraud, instead of a shield against it. *Story's Eq. § 759. Thomas v. Dickinson*, 12 N. Y. Rep. 364.)

It is also urged that the court cannot reform an oral agreement in relation to real property, when possession was not taken, nor any part of the consideration paid. Such is not this case. Here possession was taken by both parties, and the plaintiff fully performed on his part, and the fairness of the agreement is not assailed by either party. But this action is not brought to reform the agreement, but to enforce it. This objection is most clearly untenable.

It is next insisted that the contract was merged in the deeds of conveyance. But the defendant agreed to satisfy and discharge the Ladd mortgage in addition to the execution and delivery of the deed. These were separate and distinct acts. Performance as to one neither extinguished or discharged the defendant's obligation as to the other. (*Witbeck v. Waine*, 16 *N. Y. Rep.* 532.) It was held in *Atwood v. Norton*, (27 *Barb.* 638,) that when the things stipulated in an agreement to be done, were distinct in their character, and could be done at successive times, performance of one did not operate as a merger, waiver or extinguishment of the other. (2 *Kernan*, 561. 1 *Denio*, 125. 9 *Barb.* 641.) I am unable to understand how the giving of the deed relieved the defendant from the further duty, which he had stipulated to observe, of procuring the Ladd mortgage to be satisfied and discharged of record.

The decision in *Malins v. Brown*, (4 *N. Y. Rep.* 403) answers another objection, to wit, that the plaintiff, having sold and conveyed away the premises, has lost his right to demand performance of the agreement as to the discharge of the Ladd mortgage. The defendant conveyed with covenant of warranty. In this case it was expressly decided that a party who is entitled to a specific execution of an agreement to release his land from the lien of a mortgage may maintain a bill for that purpose, notwithstanding before the filing of the bill he has conveyed away the land, such conveyance being with warranty.

Nothing remains of this case then, except to determine
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how performance of the agreement is to be enforced against the defendant.

In this case the plaintiff has not, as yet, suffered ; still he is entitled to protection from apprehended or possible damage. It was this for which he contracted, and he is entitled to the benefit of the agreement according to its terms. It is a well settled rule of equity jurisprudence that a suit for specific performance may be maintained, before any actual molestation, distress or impleading of the party. So equity will decree the performance of a covenant or agreement to indemnify. The only difficulty is as to the form of the judgment or decree. In what manner is the court to enforce the duty or obligation ? The flexibility of the practice in a court of equity, and in the application of equitable principles, generally obviates all difficulty in the administration of justice in that court. Sometimes the party will be directed to execute the decree, and punishment as for contempt will follow disobedience. Sometimes compensation in damages will be decreed, in case of contumacy. This course is generally adopted when the damages can be estimated with certainty ; in which case the amount may be collected on execution. And again money when collected may be paid into court, to be applied as the ends of justice require, through the aid of a receiver or other of its officers. This latter course is often adopted, when it would, for any reason, be improper to pay the money over into the hands of the party who has invoked the aid of the court for his protection. This seems to be the situation of the case under consideration. The defendant agreed to procure the mortgage to be satisfied and discharged of record. But it is held by a third person, not a party to the action, and is not yet due. Perhaps the holder is unwilling to receive payment ; hence it may not be a proper case to punish for disobedience.

The plaintiff here is entitled to a specific performance of the agreement. That, however, may be impracticable. If so, then he may have approximate relief in some other form,

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which will secure to him the substantial advantages of his contract. This end may be attained by means of a fund to be raised by a sale of the defendant's property on execution, and to be invested or applied under the direction of the court, in such manner as to meet the conditions of the agreement between the parties. But it is not right that the money, should be collected from the defendant and paid over to the plaintiff, who may or may not apply it in satisfaction or discharge of the mortgage. The decree should be in such form as to protect all parties. As it stands, there is a chance of injury to the defendant, against which provision should be made. It should therefore be so modified as to require the money when collected, to be paid into court, or held by the sheriff subject to the further order of the court, in the alternative that the defendant shall neglect or be unable to obtain a satisfaction and discharge of the mortgage. When the money shall have been collected, in case of collection under execution by the sheriff, the plaintiff will be at liberty to move the court in the premises, and it will then be invested to meet the payments on the mortgage as they shall fall due, or he will be allowed to take the money himself on giving adequate security that it shall be paid off according to its conditions. This, however, can be settled and arranged after the money shall be made on execution, and need not be provided for in the decree, further than to permit ulterior proceedings as the exigency of the case may require. This modification of the decree is but formal, and doubtless would have been adopted had suggestion been made to the court below, in proper time. The facts and law of the case are with the plaintiff, and the judgment should be, with the modification intimated, affirmed with costs of the appeal. It is usual when a judgment is reversed in part, or modified, on appeal, to deny costs of the appeal to both parties. But here the defendant has failed in all the substantial points of the litigation both on the facts and on the law. The ground of defense has been, from first to last, that the defendant was not bound to satisfy the mort-

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gage, by reason of a pretended discharge from that duty or obligation. He has failed in his defense, and must as is usual in such cases, meet the expenses of the litigation. The modification of the judgment does not reach the merits of the controversy between the parties, but is the suggestion of the court to prevent the possibility of injustice in carrying out the details of the decree.

The decree should require 1st. That the defendant specifically perform his agreement with the plaintiff by procuring a satisfaction and discharge of the mortgage.

2d. That the plaintiff recover against the defendant the costs of the action as adjusted and allowed, together with the costs and disbursements of the appeal, and that he have execution therefor.

3d. In case of the defendant's inability or neglect to obtain a discharge of the mortgage, that judgment be entered herein against him for the amount unpaid thereon, with interest, and the further sum of five dollars for the costs and expenses of procuring the discharge, and that execution issue against his property therefor.

4th. That the sheriff retain in his hands the moneys which he shall collect under this decree, except the costs and disbursements aforesaid, and immediately report to this court in regard thereto, to the end that such further action may be had as the exigency of the case may require.

[CLINTON GENERAL TERM, May 5, 1868. *Potter, Boeckes and James*, Justices.]

CANTINE *vs.* CLARK, late Sheriff &c., and others.

Neither a judgment creditor nor an officer is justified in using the process or authority of the court oppressively, to the injury either of the debtor or of any third person.

A party who directs, and the officer who makes, an oppressive levy, is responsible for the unlawful act. As regards the officer, the rule is that where a ministerial officer does any thing contrary to the duty of his office, and damage thereby accrues, an action lies.

Where the assignee of a judgment knew, as did the sheriff also, that certain lands held by the judgment debtor and others as tenants in common had been voluntarily partitioned by the tenants among themselves, and quit-claim deeds executed in pursuance of the partition, and that the lots apporportioned to and accepted by the judgment debtor were abundantly sufficient to satisfy the judgment with the expenses of sale, yet they proceeded to sell, on execution, the lots set off on such partition to the plaintiff, one of the joint tenants, wholly regardless of his rights and equities; *Held* that this was a fraudulent act, none the less reprehensible because committed under the guise of legal sanction; and that an action would lie against the holder of the judgment, and the sheriff, to set aside the sale, and cancel the sheriff's certificate.

Although a party can obtain an order, in such a case, *it seems*, before the sale, directing the sheriff as to the mode of executing the process; or may obtain relief on motion, *after* the sale, he has also a remedy by direct action; and will be entitled to relief in such action, although *fraud* is not charged in terms, nor proved or found by the court; provided facts are stated, proved and found from which fraud is, in law, necessarily deducible.

Although there be no actual corruption or intentional fraud on the part of the sheriff, yet if he abuse his trust he is answerable to the law.

THIS is an appeal from a judgment rendered at a special term setting aside a sheriff's sale, ordering the sheriff's certificate of sale canceled, and restraining proceedings on the judgment, on which the sale had been had, for the collection thereof, except out of certain lands. The defendant Ira H. Gibson did not appear in the action. The defendant Thomas Starin appeared, but interposed no answer to the complaint. The action was brought to set aside a sheriff's sale of certain real estate of the plaintiff, situate in Montgomery county, on a judgment against the defendant Thomas Starin and one John H. Starin, and was tried before the court without a jury. The judgment on which the sale was had was recov-

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ered March 25th, 1854, and was for \$153.23. At the time of the recovery of the judgment the lands sold formed a part of the homestead of the late Myndert Starin, deceased, and was owned by the plaintiff, the defendant Thomas Starin, and five others, as tenants in common, each owning one seventh. The tenants in common made a voluntary partition of said lands, April 6, 1860, and executed deeds of release to each other, caused said lands to be surveyed and mapped out into lots, and which deeds and map were recorded and filed in the Montgomery county clerk's office. The lands conveyed to Thomas Starin on such partition were worth \$1200. On the 30th day of May, 1860, the defendant Gibson procured execution to be issued on said judgment, and under such execution the sheriff advertised all the lands conveyed by said several partition deeds, together with other lands of the judgment debtor, taking the description from the partition deeds on record. The sale was advertised for and was made September 15, 1860. On the 5th of the same month the defendant Yates purchased the judgment for \$175. All of these facts the defendants Clark and Yates well knew. The defendant Yates was acquainted with the property and its value, and just before the sale went to the clerk's office and examined the map on file. Yates desired and procured the sheriff to sell the lots of this plaintiff and other persons, and was the only purchaser at such sale; and no lot conveyed to the judgment debtor on such partition, or other lands of his advertised, were sold or offered for sale; although such lots were of sufficient value to satisfy the judgment, and there were no liens or incumbrances thereon, prior to the judgment.

The judge before whom the action was tried at the circuit decided that the sale should be canceled, annulled and set aside; that the sheriff's certificate of sale should be canceled, discharged of record and surrendered; that the plaintiff should recover costs of the action against the defendants Clark, Yates and Thomas Starin, and that those defendants should pay and be liable to pay such costs and disbursements

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as between themselves in the following order, to wit: First, the defendant Yates; second, the defendant Clark, and third, the defendant Thomas Starin; that no proceeding should be had for the collection of the judgment, out of the lots conveyed to the plaintiff on the voluntary partition, separately from the whole piece of land of which they formed a part, but that the judgment might be collected out of the lots set apart to Thomas Starin, or out of the undivided seventh of the whole lot.

L. Tremain, for the appellants.

P. Cantine, for the respondent.

By the Court, BOCKES, J. This is an appeal brought by the defendants, Clark and Yates, from a judgment rendered at a special term. The other defendants, Gibson and Starin, did not answer the complaint, nor have they appealed.

The action was brought to set aside a sale to Yates of real property by the defendant Clark, late sheriff of Montgomery county, under an execution issued on a judgment recovered by Gibson against Starin, of which Yates was the assignee and owner at the time of the sale. The ground of complaint was that the sale was made inequitably and oppressively, to the plaintiff's injury. Without giving a statement in detail, it is sufficient here to say that the facts found by the learned judge in this cause are amply sustained by the proofs. It is very clear that Yates, the assignee of the judgment and purchaser on the sale, knew, as did Clark also, of the partition of the lands held in common by the judgment debtor and others, and that the lots apportioned to and accepted by the latter were abundantly sufficient to satisfy the judgment with the expenses of sale, yet with this knowledge they proceeded to sell the lots set off on the partition to the plaintiff, wholly regardless of her rights and equities. This was a fraudulent act, none the less reprehensible because committed under the

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guise of legal sanction. Knowing of the partition and that the lots apportioned to and accepted by the judgment debtor were sufficient to satisfy the execution, it was inequitable and in fact fraudulent to disregard the rights of the plaintiff by a sale of her lands in preference to those set off to the judgment debtor. Neither a judgment creditor or an officer is justified in using the process or authority of the court oppressively, to the injury either of the debtor or of any third person. So a party who directs, and the officer who makes an oppressive levy, is responsible for the unlawful act. As regards the officer, the rule is that when a ministerial officer does any thing contrary to the duty of his office, and damage thereby accrues, an action lies. And the court will control its process so as not to injure unnecessarily the rights of others, and often times so as to protect the equities of parties to be affected by its exercise. In accordance with this rule, sales of property on which a judgment or mortgage is a lien must be made in the inverse order of alienation, when portions have been conveyed by the debtor; and in case the whole has not been aliened, those must first be sold which remain in his hands unconveyed, for that is in equity primarily liable, and should therefore first answer to the creditor's demand. As was decided in *Clows v. Dickinson*, (5 *John. Ch.* 235,) a judgment creditor is not entitled, in equity, to enforce the payment of the judgment against the lands of a subsequent purchaser, as long as there is sufficient property of the debtor remaining unsold to satisfy the judgment. And the creditor in such case is entitled to resort to the land of the purchaser to the extent only of his debts which may remain unpaid after the estate of the debtor has been exhausted. The decree in this case was reversed or modified in the court of errors, (9 *Cowen*, 403,) but on grounds not affecting the law as above stated. Indeed Judge Woodworth, in his opinion read in the court of errors, alluding to this rule remarked that it was a clear principle of equity established by all the authorities, and approves itself to the

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plainest suggestion of natural justice. In this way will the rights and equities of parties be protected against general liens by judgment, as well as against any attempt to enforce specific liens unfairly and inequitably. The authorities on this subject are too numerous to admit of citation. In this case, therefore, the parties should have sold the lots set off to and at the time of sale held in severalty by Starin, the judgment debtor. As the evidence shows very conclusively, both Clark and Yates knew of the voluntary partition, and that Starin had accepted of certain lots, the entire title to which had become vested in him by conveyance from his former co-tenants. Yet they inequitably sought satisfaction of the execution from the plaintiff's land and thus purposely violated a plain principle of duty and fair dealing.

I have no doubt the plaintiff could have obtained an order, before sale, directing the sheriff in the execution of the process; and after sale no doubt she could have proceeded by motion and obtained relief. But she also had a remedy by direct action. (6 *John. Ch.* 411. 5 *id.* 255; *same case*, 9 *Cowen*, 403.) In cases where the sale is charged to have been fraudulently made, a direct action seems the most appropriate; especially where on application the purchaser insists on holding the benefits of his purchase, for then issues can be formed and tried with much better security to the rights of all parties, than can be had on special motion.

In this case it is urged that fraud is not charged, proved, or found by the court. The facts are stated in the complaint, and are proved and found, from which fraud is, in law, necessarily deducible. This was sufficient without charging fraud in terms. The plaintiff, on proving the facts stated in the complaint, was entitled to the relief which the law would afford him. A proper judgment based on such facts would be a recovery according to the allegations of the complaint.

The judgment is right, according to my view of the case,

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in setting aside the sale and cancelling the certificate given by the sheriff. Yates does not occupy the position of an innocent purchaser, and should take nothing by his inequitable and unlawful proceeding. Nor is Clark entitled to favorable consideration, inasmuch as he permitted himself to be used by Yates in an improper way, and for a sinister purpose. I do not mean that Clark was guilty of an intentional wrong, as it is quite probable that he did as sheriffs usually do in making sales of property, viz. followed the directions of the owner of the demand. Still, as was said in *Tierman v. Wilson*, (6 John. Ch. 411,) although there be no actual corruption or intentional fraud on the part of the sheriff, yet if he abuse his trust he is amenable to the law. In this case the learned judge made, as I think, a proper discrimination in his favor, by making Yates primarily liable for the payment of the costs.

All necessary parties to the action are before the court. The judgment in favor of this plaintiff does not and could not, under any circumstances, affect any person not a party in the action.

The judgment must be affirmed with costs, and according to the stipulation of the counsel, this decision will control in the other four cases which differ from this only in having been brought by other persons as plaintiffs.

[SCHENECTADY GENERAL TERM, May 3, 1864. *Potter, Boeker, James and Rosekrans*, Justices.]

WILLISTON *vs.* WILLISTON and others.

County courts have jurisdiction of actions for the specific performance of contracts.

As a general rule, to entitle a party to ask the interposition of a court of equity to enforce the specific performance of a contract, the contract must be supported by what courts of equity deem a meritorious consideration. If the inadequacy of consideration be so great as to render the bargain hard or unconscionable, the court may refuse its aid to enforce the contract, and leave the parties to contest their rights at law.

Where G. W. the owner of premises consisting of a house and about an acre of land situated in the country, not worth over \$75, on agreeing to convey the same to his brother C. W., if he would come and live with him, obtained from the latter an undertaking that he would perpetually maintain the division fences between the lot and G. W.'s farm, being three sides of the lot—a promise which was scrupulously fulfilled for more than twenty years—and on the strength of such agreement to convey to him, C. W. had made valuable improvements upon the premises; *Held* that so far from the bargain being hard and unconscionable on the part of C. W. it would be a hard rule that would pronounce the consideration grossly inadequate; and that it would be unconscionable to deprive him not only of the land but of the fruit of his labor, and of the enjoyment of his improvements.

In equity time is not, ordinarily, of the essence of a contract respecting real estate. It may, under certain circumstances, be made, or become so; but the general rule is that if a party has not been guilty of gross neglect; if his delay can be reasonably explained, and is consistent with good faith; and time has not been made material by the agreement of the parties, a court of equity will afford relief notwithstanding the delay.

It is always sufficient for a party to show that his laches has arisen from a reasonable cause, or has been acquiesced in by the other party.

A parol agreement for the conveyance of land will, if partly executed by the party seeking relief, be specifically enforced.

Where a purchaser takes possession of lands, under a parol agreement of the vendor to convey, a court of equity will decree a specific performance; especially if improvements have been made by the vendee, on the faith of the agreement.

It was always competent to prove the loss or destruction of a paper, for the purpose of admitting parol evidence of its contents, by the party himself; and there is no provision of the code that operates to the exclusion of a party from thus testifying.

A plaintiff, in an action against executors, is a competent witness to prove the contents of a lost letter. Section 399 of the code of procedure was intended to provide for the case of personal intercourse, conversations or

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communications had personally with the deceased, and is not applicable to testimony resting in papers or documents of any description.

APPEAL from a judgment of the Lewis county court. The action was brought to enforce the specific performance of a contract for the sale of real estate, made by George Williston, the ancestor of the defendants. The county judge found the following facts and conclusions of law, to wit: 1. That in the fall of the year 1837, the plaintiff, Charles Williston, resided with his family at Oswego, in the county of Oswego, and George Williston his brother resided at Turin in the county of Lewis, and was then unmarried, and owned and occupied a large farm in said town of Turin, including the premises described in the complaint in this action. 2. That while said Charles Williston so resided at Oswego, his brother George Williston invited him by letter to remove with his family to Turin, and proposed to him either verbally or by letter, that if he would so remove to Turin, he, the said George Williston, would give him, said Charles Williston, the house and lot described in the complaint, and would convey the same to him. 3. That afterwards and in or about the month of November, 1837, Charles Williston accepted the proposition of said George Williston, and in pursuance and in consideration thereof did remove from Oswego to Turin, and took possession of the house and lot with said George Williston, and went to work for said George. 4. That afterwards and in the year 1838, George Williston built and completed a stone dwelling house on his farm and within about thirty rods of the house and lot described in the complaint, and removed thereto about the month of October, 1838, from which time the plaintiff was in the absolute and exclusive possession of said house and lot. That George Williston occupied said stone house until he died. 5. That an agreement was made by parol by and between the said Geo. Williston and Charles Williston as a part of the consideration for the conveyance of said house and lot to the plaintiff, that the plaintiff should at his own exclusive cost and expense make

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and keep up all fences around said premises, and all partition fences between the said one acre of land and the farm of said George Williston. 6. That the value of the said house and lot when the said Charles Williston took possession thereof did not exceed the sum of seventy-five dollars. 7. That after the plaintiff took and had exclusive possession of the premises, and in the years 1839 and 1840, he repaired the old house on the premises, built a cellar, erected an addition to the dwelling house, built a piazza thereto and made other permanent additions and improvements to the buildings on said premises at an expense of \$800, and dug and stoned a well at the expense of \$25, in 1838 or 1839, and in the fall of 1837 the plaintiff erected a shop on the premises, then worth \$100. 8. That afterwards and in the year 1842, Chas. Williston erected a barn on the premises at an expense of one hundred and fifty dollars. 9. That Charles Williston about the year 1840, also built a new board fence in front of said lot, along the highway, and repaired and rebuilt fences on the northeast and south side thereof, fenced off a garden by a picket fence in the southeasterly corner of said lot, all at a cost of \$67; set out fruit trees and shade trees on said premises; also repaired, papered and painted the dwelling house, and kept all of said fences and buildings in repair at his own exclusive cost and expense, and that George Williston never did any thing towards keeping said fences in repair. The plaintiff removed the shop before the death of George Williston, having obtained permission of George so to do, and now uses the same on another lot. 10. That Charles Williston, with the full knowledge of George Williston, continued in the full exclusive possession and occupation of all of said premises from the time George removed, in October, 1838, into his stone house as aforesaid, until the death of said George, and was in such possession at the time of the trial of this action, claiming title thereto and without any claim to the contrary from George Williston, who was during his life frequently at the house of the plaintiff. 11. That

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from and including the year 1841, the assessors of the town of Turin assessed the said land and premises to the plaintiff, and he has uniformly paid the taxes thereon from and including 1841, up to the present time, and they have not been taxed to George Williston since 1841. 12. That George Williston, in the latter part of the year 1837, and after Charles Williston had removed to Turin and while he lived on the premises in question, declared to Horace Clapp that he would give Charles a deed of the premises and had agreed to do so. 13. That afterwards and at different times George Williston stated to Chauncey Foster that he had given Charles the said house and lot and would give him a deed thereof, and especially about a year before his death he stated to said Foster that he had not given the plaintiff a deed of said premises, but that he would do so, and that in the winter of 1856 he declared in the presence of Helen Pond and Mrs. Collins that he was willing and ready to deed to the plaintiff the premises at any time, and expected to do so. 14. That about a year before his death, which occurred June 19, 1858, George Williston declared to Richard Dickinson, at Turin, that the property in question was the plaintiff's property. 15. That after George Williston removed to his stone house and before his marriage, which occurred on the 24th day of May, 1850, he stated to Albert White that he was ready to give Charles a deed of the premises at any time, and gave as an excuse for not having done so before that time that Charles was embarrassed by some old debts in Canada; and that in or about the year 1851, an agreement was made between Geo. Williston, Charles Williston and Albert White, by which said White was to become surety for Charles Williston on a note to Charles Kent for \$500, the money to be advanced to Charles Williston to aid him in going to California, and that said White was to be secured by a lien on the land, the lien to come from George, for so doing. And about the same time, and in relation to the same transaction, George Williston declared to said Charles Kent, that he, George, had or held

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in his hands Charles' place, referring to the premises in question, and that he should be thereby made secure for the \$500, whether Charles succeeded in California or not. 16. That George Williston at no time during his life, after the month of November, 1837, denied the right of the plaintiff to hold and own the property in question, nor that he was bound to convey the same to the plaintiff. 17. That the premises in question are now worth the sum of \$1000 to \$1200, and that the value thereof has been increased mainly by the permanent improvements put thereon by the plaintiff at his own expense, on the faith of the promise and agreement of George Williston to convey the same to him, and that nothing remains for the plaintiff to do to entitle him to a deed and conveyance of the said premises under the agreement therefor between him and the said Geo. Williston. 18. That the said George Williston could at any time during his lifetime have conveyed to the plaintiff a good title to said premises, but that no deed thereof was ever executed to the plaintiff by George Williston during his lifetime. 19. That the said George Williston died on the 19th day of June, 1857, leaving Catharine H. Williston his widow and the defendants Horace M. Williston, George G. Williston and Albert A. Williston his only children and heirs at law him surviving, all of whom are infants under twenty-one years of age, without having incumbered or conveyed the said premises. From the above facts the county judge found as conclusions of law, that the plaintiff was the owner of said premises and had been the owner and in possession thereof since the month of October, 1838, and was entitled to a conveyance of the premises described in the complaint from George Williston at the time of his death, and from the defendants as heirs at law of George Williston deceased. Upon these findings the prayer of the plaintiff was granted, and the defendants, by their guardian ad litem, were required to execute and deliver to the plaintiff a sufficient deed conveying all their right or interest in the premises.

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J. M. Muscott, for the appellants.

E. A. Brown, for the respondent.

By the Court, BACON, J. I am by no means prepared to say that I should assent to all the conclusions stated by the county judge of Lewis in his findings of fact, in this case. But there is enough in the evidence, if credited, to warrant the judgment for specific performance. From the testimony it is made to appear that in the year 1837 the plaintiff, who was then a resident in Oswego county, was induced to remove to Turin, in Lewis county, upon the invitation of his brother George Williston, to reside with him; that after remaining together some time, the plaintiff working for the said George, the latter removed to another house he had erected on his farm, and the plaintiff remained in the original tenement, upon the agreement that he was to receive a deed of the lot, being about one acre, on condition that he should at his own exclusive cost and expense build and maintain all the division fences upon the premises, and be entitled to all the improvements he should make thereon. The value of these premises, at that time, did not exceed the sum of \$75. In pursuance of this agreement, and in full reliance upon its performance, the plaintiff immediately began to make additions to, and improvements upon the premises, which he continued from time to time until he had expended thereon a sum exceeding \$1000. He continued to maintain the division fences, paid all the taxes assessed upon the premises, for a series of years, and until after the death of George Williston, and had exclusive and notorious possession, and the apparent ownership for all this period. The rights he claimed were never interfered with by George, but on the contrary he frequently acknowledged the existence of an agreement by which he was bound to convey the premises to the plaintiff down to a period not many months before his death, and averring that the only reason for not executing the conveyance

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was certain pecuniary embarrassments of the plaintiff, which would make it imprudent to convey until that impediment was removed. These are the substantial facts of this case, and about which there is really no controversy; and they present a strong case for equitable relief, unless the claim has been forfeited by the unexplained and inexcusable laches of the plaintiff, or there has been some erroneous ruling on the trial.

It is objected, preliminarily, by the defendant, that the county court had no jurisdiction of the subject matter of the action, and could not decree specific performance. It is enough to say that by the 7th subdivision of § 30 of the code, jurisdiction of the subject matter of this action is expressly given, and the court of appeals, in *Doubleday v. Heath*, (16 N. Y. Rep. 80,) has decided that this, equally with a suit for partition, is one of the "special cases" in regard to which it was competent for the legislature to confer equity powers upon the county court. It is immaterial, I concede, whether the proceeding had been initiated by petition or by summons and complaint in the form of an ordinary action. The objection on the trial was not to the form in which the remedy was sought, but to the remedy itself. This, as we have seen, is not tenable, and the objection was properly overruled.

It is insisted by the defendant's counsel that the promise to convey to the plaintiff was entirely gratuitous, or if not, and any consideration can be spelled out of the transaction, it is grossly inadequate, and equity will not enforce it.

The promise certainly was not gratuitous; and there is nothing in the case to show that the consideration was so grossly inadequate as to induce a court to refuse its aid to the plaintiff. It is true, as a general rule, that to entitle a party to ask interposition of the court, the contract must be supported by what a court of equity deems a meritorious consideration. (*Will. Eq.* 263.) As to the extent to which inadequacy of consideration will induce a court to refuse its aid, the cases are by no means in harmony, and it is difficult

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to lay down any definite or recognized rule. The nearest approximation to it is made by Chancellor Kent in the proposition that if the inadequacy of consideration be so great as to render the bargain hard or unconscionable, the court may refuse its aid to enforce the contract, and leave the parties to contest their rights at law. In this case, it must be remembered that the premises were worth not to exceed \$75, and that the party agreeing to convey obtained an undertaking, by which the division fences between the land and his farm, which, as I understand the case, surrounded it on three sides, were to be perpetually maintained—an agreement which has been scrupulously fulfilled for more than twenty years. Upon the strength of this promise, the plaintiff has made valuable improvements upon the premises, and having done all, and more than he agreed to do, so far from the bargain being hard and unconscionable on his part, it would be an exceedingly hard rule that would pronounce the consideration grossly inadequate, and it would be quite unconscionable to deprive him of the land not only, but substantially of the fruit of all his labor and the enjoyment of all his improvements thereon.

It is urged with a good deal of earnestness that the lapse of time, and the gross laches of the plaintiff in making his application to the court is an unanswerable objection to giving him relief. This is by no means so formidable a difficulty as the counsel imagines it to be. It is a familiar doctrine of the courts of equity that time is not, ordinarily, of the essence of a contract in regard to real estate. It may, under certain circumstances be made, or become so, but the general rule is that if a party has not been guilty of gross neglect; if his delay can be reasonably explained, and be consistent with good faith; and time has not been made material by the contract of the parties, a court of equity will afford relief. The explanation here is very simple, and is afforded by the very party who was to make the conveyance, and who, while constantly recognizing his obligations almost to the day of his

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death, postponed their fulfillment out of consideration for the embarrassed condition of the plaintiff, which made that delay expedient if not necessary. It is always sufficient for a party to show that his laches has arisen from a reasonable cause, or has been acquiesced in by the other party. Here both these grounds of delay are shown very clearly to exist, and abundantly excuse the laches imputed to the plaintiff.

There is another ground on which the relief should be given in this case. It has long been settled that a parol contract for the conveyance of lands will, if partly executed by the party seeking relief be specifically enforced. If one of the contracting parties induces the other party so to act that if the contract be abandoned, he cannot be restored to his former position, the contract must be considered as perfected in equity, and a refusal to complete it, at law, is in the nature of a fraud. (*Will. Eq.* 283.) And therefore where the purchaser takes possession of the lands by virtue of the agreement, with the assent of the vendor, a court of equity will decree a specific performance; and especially if improvements on the premises be made at the expense of the party thus taking possession on the faith of the agreement. That is essentially this case, and it presents in these respects those features which have uniformly appealed successfully to the equitable powers of this court for relief.

It remains to notice one or two exceptions that were taken to the admission of testimony on the trial, in respect to which it is claimed the court erred in its rulings. The plaintiff was inquired of as a witness in regard to the loss of a letter claimed to have been written by the deceased, George Williston, and gave such proof that its loss or destruction was presumed, and this is claimed to have been erroneous. The plaintiff was clearly competent to give evidence on this subject; and whether he established enough to let in the secondary proof of its contents, so far as it was proposed to show the contents, was substantially a question of discretion for the judge on the trial. It was always competent, to

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prove the loss or destruction of a paper by the party, and there is no provision of the code that operates to the exclusion of the plaintiff from thus testifying. I think enough was shown to lead to the conclusion that the letter was lost.

Conceding its loss, then was the plaintiff a competent witness to prove the contents of the letter? The objection is that this is a "transaction or communication had personally" with the deceased, and therefore by § 399 of the code, the plaintiff was incompetent to swear upon the subject. I think this is not the species of testimony the section intended to exclude. It was intended to provide for the case of personal intercourse, conversation or communications, and is not applicable to testimony resting in papers and documents of any description. Suppose the letter had not been lost, but had been produced upon the trial. There could not be a question as to its competency. The evidence of its contents, upon the assumption of its loss, is only another mode of producing the paper that it may speak for itself, in the same manner and with the same effect that it would have done had the letter itself been present. If it had been a lost note, contract or conveyance, its competency could not be questioned, and the moment the loss or destruction is proved, the further evidence only produces the paper in the only form in which it is possible to enable it to speak. The evidence the plaintiff gave upon the subject of the contents of the letter, it will be seen, was only slight, and even if erroneous, which I do not think it was, could not possibly injure the defendants, since all the material facts on which the plaintiff founded his claim for relief were supplied by other and competent proof, entirely outside of and independent of the letter, or of any thing testified to in relation to its contents. And in regard to the letter itself, it may further be said that the testimony of Clapp, which was entirely unobjectionable, established all that was necessary to be proved in regard to the fact that such a letter was written, and quite as much of

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the contents as was made to appear by the testimony of the plaintiff.

I do not perceive that there is any thing in the other exceptions that requires discussion. Upon the whole case I think the county court arrived at a just conclusion; but the judge erred in allowing costs to the plaintiff. (*See Swartwout v. Burr*, 1 Barb. 495.) In this respect the judgment must be modified; and thus modified affirmed, without costs of the appeal to either party.

[ONONDAGA GENERAL TERM, June 28, 1864. *Morgan, Bacon and Foster*, Justices.]

WILES and HARVEY vs. CLAPP and VAN DUSEN.

Where one purchases property covered by a chattel mortgage within a year after the mortgage is made and filed, the property will continue subject to the lien of the mortgage so long as the purchaser continues the owner, even though the year has expired without the filing in the town clerk's office of a copy of the mortgage with a statement of the interest of the mortgagee in the property.

One deriving title to mortgaged property from a purchaser who becomes such within the year will stand in the same position as his vendor.

But if he merely takes the property for an antecedent debt, without paying or advancing any thing at the time, or giving up any security, he will not be regarded as a *bona fide* purchaser, or purchaser in good faith.

The re-filing of a chattel mortgage in the town where the mortgagor resides is only necessary to secure the lien against creditors of the mortgagor, and purchasers and mortgagees in good faith.

A PPEAL from a judgment of dismissal, entered on the decision of the judge before whom the cause was tried, at the circuit, without a jury. The facts appear in the opinion of the court.

Smith & Kimball, for the appellants.

L. F. Bowen, for the respondents.

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By the Court, BOCKES, J. This is an appeal from a judgment entered in favor of the defendants on the decision of the judge, authorizing a dismissal of the complaint with costs. The action was trespass, for wrongfully taking and carrying away the canal boat "Pink of Lockport." The defendants justified under a chattel mortgage, Clapp as mortgagee, and Van Dusen as his servant and agent. It appeared on the trial, (and the judge so found the facts,) that in December, 1860, the boat was owned by the defendant Clapp, who on the 22d day of that month sold her to one Thomas Myers, receiving back from him a chattel mortgage to secure \$500 of the purchase price. The mortgage was duly filed in the clerk's office at Lockport, where the mortgagor resided. In July, 1861, the mortgagor removed to Syracuse, and thereafter resided at the latter place. In September, 1861, Myers transferred the property to Benjamin Bridgeford, and during the same month the latter transferred it to his son Samuel Bridgeford. In January, 1862, the latter transferred the boat to the plaintiffs, but on a prior or antecedent indebtedness. In April, 1862, the defendants, (Clapp as mortgagee and Van Dusen as his agent,) took the boat, under the provisions of the mortgage, the money secured thereby having become due, and sold it at public auction under the power of sale therein contained. The action was based on the ground that the seizure and sale were unauthorized and unlawful.

It is not disputed that the mortgage was a valid lien on the boat in September, 1861, when the Bridgefords became purchasers. They purchased, both father and son, within the year after the mortgage was made and filed. The boat was therefore subject to the lien of the mortgage so long as Samuel Bridgeford remained the owner, even although the year had expired without filing a copy with a statement of the interest of the mortgagee in the property thereby claimed by him. This point was decided in *Dillingham v. Ladue*, (35 Barb. 38,) and also in *Meach v. Patchin*,

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(14 *N. Y. Rep.* 71.) It was also decided in the former case cited, that one deriving title to the mortgaged property from a purchaser (who became such within the year) will stand in the same position as his grantor. The plaintiffs in this action, having purchased from Samuel Bridgeford, occupied his position as regards this mortgage, with no better rights; and as against him, we have seen, that the mortgage was valid and operative. But the plaintiffs were not purchasers in good faith, inasmuch as they took the property for an antecedent debt. Nothing was paid or advanced at the time of the purchase, nor did they give up any security. They cannot therefore be regarded as *bona fide* purchasers or purchasers in good faith. (22 *N. Y. Rep.* 564-7. 17 *id.* 580, 3, 4. 4 *Paige*, 215. 17 *Barb.* 446. 37 *id.* 571.)

The re-filing of the mortgage in the town where the mortgagor resided was only necessary to secure the lien against creditors of the mortgagor, and purchasers and mortgagees in good faith. These plaintiffs were neither. It is therefore unnecessary to determine any question in regard to the re-filing of the defendants' mortgage.

The execution of the mortgage was well proved. The subscribing witness was shown to be out of the jurisdiction of the court. (12 *John.* 188. 4 *id.* 461. 4 *Wend.* 313.)

The defendants fully justified the taking and sale of the property, under the mortgage, and the judgment must be affirmed with costs.

[CLINTON GENERAL TERM, July 12, 1864. *Potter, Boeckel, James and Roskrens, Justices.*]

STAPLES vs. PARKER.

A stipulation or agreement entered into by the counsel for the respective parties on the trial of a cause, and in the face of the court, relative to the conduct of the suit and the proceedings therein, and entered in the minutes, is binding and conclusive upon the parties.

The rule which requires all agreements between parties and their attorneys, in respect to the proceedings in a cause, to be in writing, has no application to that class of stipulations.

By a written agreement under seal between the plaintiff and defendant, the former agreed to sell and convey to the latter a farm of 400 acres, and to transfer to him certain personal property thereon, consisting of a great number of articles; which sale and transfer were not necessarily to be simultaneous acts. And the defendant agreed to pay and secure to the plaintiff the sum of \$7500 as the price or consideration of such sale and transfer. The parties then bound themselves, their heirs &c., in the sum of \$1000, that in case either party should, in any way, fail to fulfill or perform the contract, or any part or portion of it, then the party in default should pay unto the other the said sum, "the same being agreed upon by the said parties as actual and assessed damages, and the same to be paid without suit or litigation." *Held* that the sum named was intended by the parties as a *penalty*, and not as *fixed and liquidated damages*.

THIS action was for the breach of a contract to purchase real estate and personal property. The contract contained a clause fixing and liquidating the damages, in case of failure to perform, at \$1000. The defendant gave evidence tending to show his readiness and willingness to perform the contract on his part on the 1st April, 1863. During the progress of the trial many objections were made to the admission and rejection of evidence by the respective parties, and exceptions taken by each party to the ruling of the court thereon; but at the close of the trial it was agreed by the counsel for the respective parties, that the court should submit to the jury the question whether the plaintiff had performed or was ready and willing and offered to perform the contract on his part on the first of April, 1863, and whether the defendant performed or was ready and willing to perform the contract on his part on the 1st April, 1863, and in case the jury should find in favor of the plaintiffs on

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these questions that the jury should assess the plaintiff's damages by reason of the breach of the contract by the defendant, and that upon such assessment being made by the jury a verdict should be rendered in favor of the plaintiff for \$1000, being the damages stipulated in the contract, subject to the opinion of the court at general term, upon the sole question whether under the agreement given in evidence the plaintiff was entitled to recover said sum of \$1000. And that all other questions of law raised in the case should be waived. And in case the court at general term should decide that the plaintiff was not entitled to recover said sum of \$1000 as stipulated damages, then that judgment should be entered upon the amount at which the jury should assess the plaintiff's damages. This agreement of counsel was made in open court, and the cause was submitted to the jury under it, by the court. The court charged the jury as to the questions of fact agreed to be submitted to the jury, and the jury retired in charge of a constable and returned into court and returned a verdict in favor of the plaintiff for \$55.50 damages. The court drew up and ordered the clerk to enter an order in these words: "By the consent of the counsel for the respective parties it is ordered that verdict be entered for the plaintiff, for one thousand dollars, being the damages stipulated in the contract in the complaint mentioned, subject to the opinion of the court at general term, upon the sole question whether under said agreement the plaintiff is entitled to recover said sum of \$1000, and all other questions of law in the case are waived. And in case the court at general term shall decide that the plaintiff is not entitled to recover said sum of one thousand dollars, as stipulated damages, then judgment shall be entered upon the verdict for \$55.50." The defendant's counsel thereupon objected to said order, but the court overruled the objection and directed that the defendant should abide by his agreement. The defendant's counsel excepted to this decision.

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S. Thomas, for the plaintiff.

O. F. Thompson, for the defendant.

By the Court, BOCKES, J. Whatever of irregularity, if any there was, either during the trial or in its ultimate disposition on receiving the verdict of the jury, was expressly waived by the agreement of the parties made in open court, and entered upon the record. That stipulation the parties had a perfect right to make, and having entered into it, they are concluded by it. It was held in *Banks v. American Tract Society*, (4 Sandf. Oh. 438,) that a stipulation or engagement made in open court, touching the subject matter of the suit, was a contract which the court was bound to enforce. It has, I think, always been the practice to hold parties strictly to their engagements made during the trial and in the face of the court, relating to the conduct of the suit and its proceedings. The rule which requires all agreements between parties and their attorneys, in respect to the proceedings in the cause, to be in writing, has no application to that class of stipulations. Such rule was intended to cover arrangements and matters of agreement made by the parties or their attorneys out of court. The stipulation in this case, entered into on the trial, to the effect that the only question reserved for the court should be whether the sum of one thousand dollars mentioned in the agreement was to be considered stipulated damages, must conclude the parties, and that question is the only one now in the case; all others being disposed of by the stipulation and verdict of the jury.

By the contract between the parties, on which the action is brought, the plaintiff agreed to sell and convey to the defendant his farm, consisting of about four hundred acres of land; also utensils for making cheese and sugar, specifying the several articles; also numerous farming utensils, naming them; a quantity of shingles, a swarm of bees, four shoats, one horse, one bull, three sheep, a number of fowls, a quan-

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tity of hay, one hundred bushels of potatoes, fifty bushels of oats, twelve of wheat, six cider barrels, articles of household furniture; together with some other personal property, all particularly specified.

In consideration whereof the defendant agreed to pay him \$7500 at the times and in the manner therein stated. Then followed this provision: "And furthermore be it fully understood that we, the above mentioned parties, do hereby firmly bind ourselves, our heirs, executors, administrators and assigns, in the full sum of one thousand dollars, that in case that either party shall in any way fail to fulfill or perform the above specified contract or any part or portion thereof, then the party in default shall full, well and truly pay or cause to be paid unto the other the just and full sum above mentioned, the same being agreed upon by the said parties as actual and assessed damages, and the same to be paid without suit or litigation." It having been found that the defendant failed to fulfill and perform the contract, the question is, shall he recover the sum of one thousand dollars as fixed and liquidated damages?

It will not be denied that parties may contract for the payment of any sum they may choose to adopt as the measure of damages for the breach of an agreement, and when they do so contract it is the duty of the court to hold them to their obligation, without attempting to make for them a new contract or relieve them from hardships which they have voluntarily and understandingly assumed. This principle has always been recognized. But the difficulty in this class of cases has generally arisen from doubts as to the meaning of the language employed, or in regard to the purpose and intent of the contracting parties. As was said in *Hosmer v. True*, (19 Barb. 106,) the contract in such cases, as in every other, is to govern, and the true inquiry is, what was the undertaking? It has been often held that the terms "fixed damages," "liquidated damages," "settled damages," "actual damages," and words of like general import, do not of

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necessity determine the question. But the intent of the parties must be gathered from a consideration of the terms and conditions of the agreement and its subject matter. The rules established by the courts from time to time and applied in giving construction to contracts with a view to determine the intention of parties on the subject of damages, are clearly and truly stated by Judge Shankland in *Bagley v. Peddie*, (16 *N. Y. Rep.* 469.) It is unnecessary however here to consider those rules in detail, as many of them have no direct bearing on the case in hand. Prior to the case of *Cotheal v. Talmage*, (5 *Seld.* 554,) it was supposed to have been a settled principle that when a sum is stipulated to be paid for the non-performance of any or either of several distinct acts which a party has agreed to perform, it must be construed as a penalty. But this rule of construction is repudiated by the court of appeals in the case last cited, where, after a careful examination, it was held that the sum fixed in a contract will be considered as damages, although by the terms of the agreement it is to be paid on a breach of *any one* of several stipulations of different degrees of importance, where the damages arising from the breach of each of them would be in their nature indefinite. This case is referred to in the later case of *Clement v. Cash*, (21 *N. Y. Rep.* 253,) where the principle is approved, (p. 259.) In *Reilly v. June*, (1 *Bing.* 302,) the sum agreed upon as stipulated damages was payable upon the non-performance of *any part* of the agreement; the plaintiff was permitted to recover the whole amount on proof of a breach of one of the several conditions. This decision corresponds with the case of *Cotheal v. Talmage*, which must be deemed to settle the law in this state, which before was either unsettled or was supposed to be settled the other way.

But was not the sum mentioned in the agreement in this case intended as a penalty as to some of the things agreed to be done and performed by the parties? If so, then it must be held to stand as a penalty as to all. The cases hold that

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the sum named cannot be considered as a penal sum as to one part of the agreement without construing it to be such as to the whole. By the agreement the plaintiff was to sell and convey the farm, and also to transfer certain personal property, consisting of a great number of articles, and not necessarily to be simultaneous acts; and the defendant was to pay and secure to him \$7500. They then bound themselves in the sum of \$1000, that in case either party should in any way fail to fulfill or perform the contract, or any part or portion of it, then the party in default should pay unto the other the said sum, as actual and assessed damages. The parties plainly contemplated the possibility of a part performance, and omission or refusal to perform other parts of the agreement. It provides that in case either party should *in any way* fail to fulfill the contract, *or any part or portion* of it, then, &c. This being so, suppose the plaintiff had fully performed, except the delivery according to the contract, of one or all of the six milk pails, or the cheese press, or the three pitchforks, or the two hoes; or in short had fully performed, except the delivery of any one or of a very few of the various articles enumerated in the contract, which he agreed to transfer and deliver, was it the intent of the parties that he should, in that event, pay the defendant \$1000? I think not. This would be so grossly disproportionate to the actual damage or injury as to shock one's sense of justice. The parties could not have intended such extravagant and absurd results. In this view, they must have regarded the sum named as a penalty rather than fixed and liquidated damages.

In my judgment the sum named should be construed as a penalty; and judgment should be directed for the damages proved, \$55.50, and costs.

Judgment accordingly.

[CLINTON GENERAL TERM, July 12, 1864. *Potter, Boekes, James and Roskrans*, Justices.]

MEMORANDUM.

GEORGE GOULD *vs.* CHARLES GOULD.

THIS case is reported 36 Barbour, 270, when it came before the court on appeal from a judgment of the special term overruling a demurrer to the complaint. The judgment of the special term being affirmed, at the general term, the defendant put in an answer denying the material allegations of the complaint. The cause was then referred to B. W. Bonney, Esq. as sole referee, for hearing and decision; who reported that there was due to the plaintiff, from the defendant, the sum of \$21.49 for principal and interest, and no more. The report of the referee was confirmed, at a special term of the court, and judgment was rendered in favor of the plaintiff, for that sum. From that judgment the plaintiff appealed to the general term.

Thos. H. Rodman, for the appellant.

Jos. H. Choate, for the respondent.

The following opinions, delivered at the general term, show what was the final disposition of the cause in this court.

LEONARD, J. The plaintiff, as assignee of Julia Gould, makes the mistake of requiring the defendant to pay the losses arising from bad investments of Julia's money a second time. In the settlements made with her, the defendant allowed all they had cost her. Had she brought an action, and established against the defendant bad faith in investing her money, as her agent, at the period of any of the several

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settlements, or changes in the investments, she could have recovered no more than the defendant has paid her. She has been paid her original capital with interest, taking it when it was largest, at the time of the sale of the N. Y. Central R. R. investments. Assuming that she has been charged with investments a price greater than their actual worth, or market value at the time of the charge, these investments, when they afterwards proved bad, have in every instance been taken off her hands at a price equal to the amount with which she was charged, and interest. The transactions have been rescinded or settled, by returning the bonds or stock to the defendant, and receiving from him a sum equal to the original cost as charged to Miss Gould, and interest. The plaintiff, as her assignee, can have no second satisfaction of her damages, by now claiming to affirm transactions with the defendant which have been long ago disaffirmed and settled, when the defendant discovered that the investments had proved to be less profitable to Miss Gould than he had expected they would be. The transactions appear to have been honorable on the part of the defendant—he assuming the losses in every instance when the investment was not profitable.

In regard to the interest (\$240) due on the 1st March, 1854, on the Alton bonds, they were entered in the account of that date, although the account was rendered in February preceding, showing that the bonds were sold, as of a date which did not carry the interest to the purchaser.

The judgment, appealed from by the plaintiff, should be affirmed with costs.

SUTHERLAND, J. The referee finds that the Michigan Southern rail road bond, and the Alton city bonds, were sold by the defendant to Julia Gould. I do not find any satisfactory evidence that these bonds were purchased *with*

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the funds of Julia. Without such evidence the plaintiff's case fails.

I concur in the conclusion arrived at by Judge Leonard.

CLERKE, J. also concurred.

Judgment affirmed.

[NEW YORK GENERAL TERM, May 2, 1864. *Leonard, Clerke and Sutherland*, Justices.]

APPENDIX.

HON. JOHN SAVAGE, LL. D.,

FORMERLY CHIEF JUSTICE OF THE SUPREME COURT OF JUDICATURE,

Died at his residence in the city of Utica, on the 19th day of October, 1863, at the advanced age of eighty-four years.

On the next day, the following obituary notice appeared in the *Utica Morning Herald*, from the pen of the Hon. HIRAM DEXIE, some time a Judge of the same court, now one of the Judges of the Court of Appeals.

"Judge SAVAGE was born at Salem, Washington county, in this state, on the 22d of February, 1779. He was of Scotch descent, his ancestors having emigrated to this country from the north of Ireland, to which they came at an earlier period from Scotland. He took his degree of Bachelor of Arts at Union College the last year of the last century, receiving the first honors of his class. Embracing the profession of the law, he was admitted to the bar after the usual probation, and commenced the practice in his native town. At that day the state was divided into large districts for the purpose of the administration of criminal justice, and Mr. SAVAGE was appointed district attorney for the district embracing the northern counties. His health becoming impaired, he made a voyage to Europe, and after spending some time in traveling, principally in Ireland, returned, and was reappointed to his former position of prosecuting attorney. In the year 1812 he was elected a member of the assembly from his native county. This, it will be recollected, was during the war with England, and at a time when party conflicts were unusually earnest and violent. He belonged to the political interest which supported the administration of Mr. MADISON and upheld the conduct of Governor TOMPKINS, and favored the vigorous prosecution of the war, which he believed to be a just

and necessary measure on account of the outrages committed by the British government upon our commerce and seamen. The assembly of that year embraced an unusual number of gentlemen of mark and talent, among whom may be mentioned the late Gov. BOUCE, SAMUEL YOUNG, DAVID B. OGDEN and others. The republican party, as the supporters of the administration were then called, was in a minority; and it may be stated as an evidence of the estimation in which Mr. SAVAGE was held at an early age, that he was selected, at the close of the session, to draw up the address of the minority, containing a declaration of their sentiments and a vindication of their principles and conduct, which duty he performed with marked ability. He subsequently served two terms as a representative in congress, having been first chosen in 1814 and re-elected in 1816. After the expiration of his last term, he was appointed comptroller of the state, to succeed ARCHIBALD MCINTYRE who had held the place a great many years. It would be impossible in this brief sketch to particularize the various public measures in which Mr. SAVAGE participated, or which were originated by him. It may be mentioned, however, that the system of taxing corporations, as such, was originated by him while performing the functions of the office of comptroller. The practice had been to assume to assess the stockholders for their interests, along with the mass of their property, where such interests were known and the stockholders were residents of the state; but the large amount of money thus invested escaped almost entirely from contributing to the public burthens. The new system was adopted in consequence of an elaborate report from the comptroller, and has ever since been the established policy of the state.

While Mr. SAVAGE continued to execute the office of comptroller, the constitution of 1822 was adopted and went into operation. The changes effected by that instrument necessitated a complete reorganization of the judiciary, and Mr. SAVAGE was called to, and with considerable reluctance on his part accepted, the office of Chief Justice of the Supreme Court, to which he was appointed on the 29th of January, 1823; and he continued to hold that position until the latter part of the year 1836. It was in this office that the greatest distinction of his life was earned. Having served, a large portion of his time, before his appointment, in other walks of the public service, he did not consider that he possessed any peculiar qualifications as a judge; but those who controlled the question thought otherwise.

His labors were henceforth to be performed in the face of a learned bar, comprising many veteran lawyers, and with the disadvantage of

succeeding to the seat of a race of judges of great abilities and high reputation, of whom the state had justly been proud. But with a good legal education, unusual strong common sense and good judgment, and high powers of discrimination, together with patient study and investigation, added to perfect uprightness and integrity, he immediately overcame the slight embarrassments of his position, and by the unanimous verdict of the bar and the community, he was, to say the least, one of the best judges who ever presided in our highest legal tribunals. The character of his mind was that of great directness and simplicity. This quality enabled him at once to see the controlling point in a cause and to divest it of all extrinsic and superfluous considerations. His judgments, though generally the result of much study and reflection, appeared so obvious and natural when finally matured, as to command ready acquiescence. The nine volumes of Cowen's reports and the first fifteen volumes of the reports of Mr. Wendell, contain the evidences of his judicial labors, and together form a lasting monument to his memory. Among the opinions which exhibit his strong powers of judicial reasoning upon constitutional law, there is now recollected the one delivered in the court for the correction of errors in the case of *The Steamboat Company v. Livingston*; as also one exemplifying his admirable faculty of analysis upon recondite doctrines of the common law, in the case of *Patterson v. Ellis*.

The resignation of Judge SAVAGE was occasioned by the illness of his wife, which in his opinion demanded his personal care, and which resulted soon afterwards in her death. The only public employment in which he afterwards engaged, was a short term of service as a clerk of the supreme court in this city, to which he was appointed by the judges of the court in which he had presided. He afterwards removed to his farm at Salem, and again, after a few years, returned to this city, where he has spent his declining years in the tranquil enjoyment of domestic life, and under circumstances of as much comfort and happiness as his failing health and the infirmities of age would permit.

Judge SAVAGE had some marked peculiarities of character. He was reserved and diffident to a degree quite unusual in one who had mixed so much in public life, and had associated so largely with his fellow men. To a common acquaintance his manner would be considered cold, and he would be thought to lack enthusiasm of character and vigor of purpose. The contrary of all this was certainly the fact. Among intimate friends, and when not distracted by business and care, no man was more genial or interesting; and under a some-

what dry exterior, he possessed genuine warmth of heart. Scarcely any person had greater tenacity of purpose where questions of principle were concerned and his opinions had been formed, and they were usually made up upon subjects which affected society or the country. In common with all good men he was greatly affected at the condition of the nation in the present crisis; and he saw no safety for the union and for the preservation of free government on this continent, but in a steady support of the constituted authorities, and a vigorous prosecution of the war for the suppression of the rebellion.

It only remains to be stated that he died in a firm belief in the truths of Christianity and in a humble trust in the merits of the Redeemer."

The annexed notice, written by Dr. ASA FITCH, of Salem, was published in the *Salem Press*, on the 17th of November, 1868 :

"The Savage family is of French origin, *Sauvage* and *Sauvages* being the French orthography of what are probably portions of the same family, still existing in France. Being protestants, the revocation of the edict of Nantes is supposed to have been the occasion of their forsaking their native land. And intermarried as the family has now been, for three generations, with persons of Scottish descent, it has lost all the peculiar traits of the French character and shows prominently those of the Scottish race.

The great grandfather of Hon. JOHN SAVAGE, born in France, lived in North Ireland, in Londonderry or its neighborhood, according to the family tradition. He died, leaving three sons, who in their boyhood came with their mother and step father to this country, in 1717, the family settling at Rutland, Mass.

The two younger of these sons were twins, one of whom, Capt. John Savage, is buried in our old grave yard, his tombstone stating that he passed through 'many adventures, both by sea and land.' I doubt not every person in our town has remarked that inscription, and has felt a curiosity to know something of the adventures to which it alludes. Capt. Savage was ten years old when he came to this country, and followed the sea during the first part of his life. He gradually accumulated property until he became the sole owner of the vessel which he commanded. In a storm his vessel was wrecked on the island of Cape Breton; his cargo and men were all lost, he himself barely escaping with his life. Unwilling to trust the treacherous waves further, he abandoned the sea, married one of his step

father's daughters, and settled upon a farm in Pelham, Mass. He was there selected as captain of one of the Massachusetts companies of volunteers in the old French war, and served under Bradstreet in his expedition against Fort Frontenac, and under Gen. Abercrombie in his disastrous assault upon Ticonderoga. He was lame at the time of this latter engagement, but notwithstanding this, he placed himself at the head of his men and led them into the fight. His company was badly cut to pieces. At one point one of his men, Hugh McCartee, (afterwards a resident of our town,) was left standing almost alone, when Capt. Savage halloed to him, 'Why don't you run and save your life!' To which McCartee shouted back to him in reply, 'It will be time for me to run when I see my lame captain flying. I have two sound legs left to me yet, and can soon overtake him.' And he heroically stood his ground until he saw the captain leading off the shattered remains of his command.

After residing twenty-two years in Pelham, Capt. Savage removed to this town in the early part of the settlement in the spring of 1767. He and Joshua Conkey had been appointed, by the proprietors of the town, their agents and attornies for disposing of their lands here, whereby his name comes to be signed to so many of the original title deeds under which the lands of the town are now held. He died January 27th, 1792, aged 85 years.

His second son, Hon. Edward Savage, was married on the last day of the year of their arrival here, to Mary, youngest child of Alexander McNaughton, Esq., (or McNachten as the name was formerly written,) who lived on the present Deacon Samuel Dobbin farm two miles west of East Greenwich. Esq. McNaughton was a leading man in the large company of emigrants which Capt. Laughlin Campbell brought from Argyleshire, Scotland, in 1739 and 1742, to whom, after long and vexatious delays, the present town of Argyle was granted. He was one of the five trustees on whom the arrangement of the affairs of the town was conferred by its charter, and was the first justice of the peace in this county. Upon the coming on of our revolutionary contest, he and most of his family connections adhered to the cause of the king, while his son in law, Savage, zealously espoused the cause of the country, and was intimately associated with Gen. Williams, Judge Webster, Col. McCracken and others, in guiding this county through those perilous times. He was the first sheriff of the county after the royal authority was subverted, was a member of the legislature twenty-one years, a member of the old council of appointment three terms, not to mention the numerous minor positions

of honor and responsibility which in the course of his long life he occupied, both in church and state. He died October 13, 1833, aged 87 years.

His only son, Hon. JOHN SAVAGE, a sketch of the leading incidents of whose life is the principal subject of this communication, was born in Salem, on the 22d of February, 1779. He received his academical education here in town, studying Latin in the school of Mr. John Watson, mathematics with St. John Honeywood, and completing his preparation for college in the academy when it first commenced under Preceptor Ingalls. He was in the third class which was graduated at Union College, in 1799, on which occasion he had the first honor, the Latin salutatory oration, assigned him. He studied law in the office of Judge Woodworth in Troy, and in 1803 was admitted as an attorney, and three years later as a counsellor in the Supreme Court, Martin Van Buren being on both of these occasions examined in the same class with him.

In 1803 he opened a law office in Salem, in partnership (continued only a year and a half) with John Russel, Anthony I. Blanchard being the only other lawyer in town at the time. His first important exercise of the elective franchise was in the presidential contest of 1804, when he voted for the legislature which cast the vote of this state in favor of Thomas Jefferson; and he was appointed the messenger to convey this vote to Washington, where he delivered it to Aaron Burr, then Vice President; and on this occasion he was introduced to Mr. Jefferson, Mr. Gallatin, Mr. Granger the Post Master General, and other noted men in Washington.

In 1806 he entered into a partnership, which continued five years, with the late Hon. John Crary. He was this year elected supervisor of the town, and also received from the council of appointment the office of district attorney for the northern district of the state, which at that period was divided into the four counties of Washington, Essex, Clinton and St. Lawrence.

In 1810 he married Esther, daughter of Gen. Timothy Newel of Sturbridge, Mass. who died the following March, and in the succeeding autumn he was himself prostrated by typhus fever, which nearly carried him to his grave, and left him so feeble and predisposed to consumption that, upon the concurring advice of the Doctors Allen, he gave up his professional business, intending to take a sea voyage, and pass the winter in the West Indies. Gerrit Wendell, however, being counsel for a gentleman who had an estate in Ireland which he was anxious to have sold and closed up, persuaded him to go thither,

with this business in his charge. Passing through Albany on his way, he handed in to Gov. Tompkins his resignation of the office of district attorney. 'Who would you like to have appointed your successor?' asked the governor. 'Roger Skinner of Sandy Hill would be a very good appointment,' Judge Savage replied, although he had never consulted with him upon the subject. Mr. Skinner was thereupon appointed, and repaid Judge Savage ten-fold for this compliment in after years.

He landed in Ireland in December, 1811, and accomplished the business which had been confided to him. He had intended after this to make a tour through England and Scotland, but the prospect of a war between this country and Great Britain had become so threatening that it caused him to forego this purpose and hasten back home. He took passage upon a vessel which was loaded with Irish emigrants. Impressment of British subjects from vessels on the high seas was a daily occurrence at this time, and midway of the ocean they were overhauled by a British cruiser. But the captain's courtesies to the officers so conciliated their favor that they merely went through with the formalities of an examination, without impressing any of the emigrants, although several of them were fine, robust young men. On the 12th of June, 1812, they came in sight of Montauk Point and ran into Long Island Sound. On reaching New York they learned that a British man of war, informed of their being on the ocean, was lying off Sandy Hook purposely to intercept them and send them back to England.

To re-establish his health he now for several years devoted a portion of his time to agricultural pursuits, assisting his father with his farming operations. Upon the solicitation of David Woods he entered into a law partnership with him; and Mr. Skinner, on hearing of his return, immediately resigned the office of district attorney and procured his reappointment, though a change in political parties caused his removal soon after.

In 1813 he was elected a member of the legislature. The country was now engaged in the war with Great Britain, and political strife raged with unusual violence. Judge Savage regarded the war as being necessary and just, and felt that the government of the country ought therefore to be sustained in its vigorous prosecution. He accordingly gave his support to the administration of President Madison and approved the course of Gov. Tompkins. His party was in the minority in the state legislature, and it is an evidence of the estimation in which he was held, that at the close of the session he was

selected to draw up the minority report, vindicating their principles and conduct, which document he prepared with marked ability.

He next served two terms in congress, being elected a representative in 1814 and again in 1816. In November of this latter year he married his second wife, Ruth, daughter of Gideon Wheeler, Esq. of Lanesborough, Mass. and he now sought to withdraw himself from political life and devote himself to the practice of his profession. He accordingly declined another nomination to congress, and entered into a law partnership with Philo Curtis. In 1818 the district attorney was made a county officer, to be appointed by the board of supervisors. Jesse L. Billings, the occupant of this office at that time, having spoken contemptuously of this change, caused the supervisors to drop him and reappoint Judge Savage, although they were both of the same political party.

He now regarded himself as probably settled to pass the remainder of his life in the practice of law in the village of Salem. As he was sitting one day in his office, in February, 1821, Sheriff Gibbs called in upon his way home from Albany. The judge inquired what was the news in Albany. 'The main item of news,' said Gibbs, 'is that John Savage, of Salem, has been appointed comptroller of the state of New York.' Savage was thunderstruck, and could scarcely credit his friend's statement. Archibald McIntyre had held this office for the previous fifteen years, serving in it most acceptably and faithfully; but Gov. Tompkins being a public defaulter, McIntyre had taken an active part in exposing his defalcation and defeating his re-election. A majority of the council of appointment, however, were Tompkins' political friends. Roger Skinner being one of the number, brought forward a motion for Mr. McIntyre's removal. 'For what reason?' sternly asked Gov. Clinton, the presiding officer of the council. Of course no valid reason could be given, and Skinner merely replied, 'I think the public good requires it.' On putting the motion to vote, it was carried. Skinner then nominated Judge Savage for the office, and he was elected.

Savage thought his friend Skinner had done a rash thing in taking this step. He distrusted his ability to perform the duties of this important office, they were so unlike those of any position in which he had previously been placed. He hastened immediately to Albany and sought an interview with McIntyre. Instead of the gruff reception which he had anticipated, he was met with the utmost cordiality and kindness, Mr. McIntyre pleasantly remarking, it was the fortune of politics which had removed him, and he cheerfully submitted

thereto. Upon Judge Savage's adverting to the great amount and complex nature of the business of the office, his own inexperience in business of this kind, and his fears that he should be embarrassed at every step and wholly unable to suitably perform the duties of the station, Mr. McIntyre assured him that if he only retained in their places the old deputy and clerks, who were familiar with the affairs of the office in all their details, he would experience no difficulty whatever.

His resolution was thereupon formed. Although he was beset with applications for appointments by the dozen, and his political friends advised him to make a clean sweep of the office, he firmly refused, and retained all the former clerks in their places. He moved from Salem to Albany, and summoning to his assistance the deputy and head clerks, applied himself most assiduously to a study of the business of the office and soon became perfectly master of it. The thorough acquaintance which he thereupon showed with all the affairs of the comptroller's department added greatly to his popularity.

We have not space in this brief sketch to particularize the different public measures which he originated, or in which he prominently participated. Suffice it to observe that the system of taxing corporations originated with him. It had previously been the practice to assess the individual stockholders the amount of their interest, in connection with their other property. But many of the stockholders were nonresidents of the state, and of others their interests were unknown. Hereby a large amount of money which was profitably invested within the state escaped from contributing any thing towards sustaining the public burthens. An elaborate report on this subject, from Comptroller Savage, led to the adoption of the new system, which has since continued to be the established policy of the state.

The office of chief justice now came to him, almost as unexpectedly as that of comptroller had done. By the new constitution, adopted in 1822, a reorganization of the judiciary of the state became necessary. The democratic party was at this time in the ascendancy. Of the old judges of the supreme court, Spencer, Platt and Woodworth, the two first had rendered themselves obnoxious to the party by the course they had taken in the convention for revising the constitution, and Gov. Yates was besought to nominate in their stead Messrs. Van Buren, Young and Talcott. But the governor had too high a respect for his old associates upon the bench to thus turn them adrift, and accordingly nominated them for reappointment. They were all rejected by the senate. This vexed the governor, and he was a man

of too much spirit to be dictated so entirely by party. Affairs being in this posture, one of the governor's friends who was desirous of a seat upon the bench, induced him to nominate Comptroller Savage for chief justice and Sutherland and himself for associates. The senate on the 29th of January, 1823, elected the two first and rejected the third, regarding him as having been the active instrument in keeping the favorite candidates of the party in the background. Upon the suggestion of Judge Savage, the name of his old instructor in law, Judge Woodworth, was then sent into the senate a second time by the governor, and he was thereupon elected.

It was in this office of chief justice of the supreme court of the state that Judge Savage acquired the greatest distinction of his life.

* * * * *

He held the office of chief justice until August, 1836, when he was induced to resign it in consequence of the illness of his wife, which he regarded as demanding his personal care, and which soon after resulted in her death. In 1837 he moved from Albany to Utica, where a short term of service as clerk of the supreme court, to which he was appointed by the judges of the court in which he had so long presided, was the only public service in which he was afterwards engaged. In 1840 he came back to Salem, and occupied himself in repairing the family homestead and premises, moving his family here in 1842. He regarded with favor every public measure which tended to the advancement of good morals and the improvement of society. A decided friend of the temperance cause, from its commencement, he was a prominent officer in the state society, and after his return here in our county organizations, for promoting this reform, and of the addresses which he delivered when occupying these positions two at least were published. Upon returning again to the agricultural pursuits of his early years, he took a lively interest in our county agricultural society, officiating as its president and delivering the address at its second annual fair. In the canvass of 1844 he was one of the presidential electors, and president of the electoral college which cast the vote of the state in favor of James K. Polk. And in this connection the record merits to be preserved, of the exercise of the elective franchise made by one so profoundly versed in the laws and polity of our country as was Judge Savage, and to whose heart its welfare and the perpetuity of its government was so dear. As has already been stated, at the outset of his political life, in 1804, he cast his vote in favor of Thomas Jefferson. In 1808 he voted for Mr. Madison, and again in 1812. In 1816 he voted for Mr. Monroe, and again in 1820.

In 1824 he voted for Mr. Crawford, and in 1828 for Gen. Jackson, as he did again in 1832. In 1836 he voted for Mr. Van Buren as he did again in 1840, and in 1844 for Mr. Polk. In 1848 he voted again for Mr. Van Buren; in 1852 for Gen. Pierce; in 1856 for Gen. Fremont; in 1860 for Abraham Lincoln; and for governor in 1862 he voted for Gen. Wadsworth.

For a time after his return to Salem he was accustomed to go south to pass the winter season, deeming himself so predisposed to pulmonary disease that he was illy able to endure the rigors of our northern climate. He thus passed two winters in St. Augustine, one in New Orleans, one in Washington and one in the city of New York. He then ventured to remain at home through one winter, and as the result of this ample experience he became convinced that a southern residence during the inclement period of the year gave him no more immunity from protracted colds and coughs than he enjoyed here at the north.

Having no male heir to succeed him in the cultivation of his paternal acres, and conscious that in the infirmities of advanced life a city residence would furnish him and his family with more of the comforts and conveniences of life than they could have in an isolated rural abode, he in 1853 disposed of the farm which had been occupied by his family nearly a century, and returned to Utica, where he passed his remaining years in the tranquillity of domestic life, and died on the 19th of October last, aged 84 years.

INDEX.

A

ACTION.

1. The maker of a promissory note has the whole of the last day of grace within which to pay it; and though he should in the course of the day refuse payment, which will entitle the holder to protest it and give notice to the indorsers, yet if he subsequently, on the same day, makes payment, it is good, and the notice of dishonor becomes of no avail. Hence an action commenced on the third day of grace, though after protest, will be prematurely brought. *Oothout v. Ballard*, 88
2. In respect to the time for commencing a suit, there is no distinction between a note payable at a bank, and one payable at large, or at the counting house of the maker. *ib*
3. The right of every one to use his own property as he pleases, for all the purposes to which such property is usually applied, is unlimited and unqualified, up to the point where the particular use becomes a nuisance. *Fisher v. Clark*, 829
4. Simply turning one's own sheep, having an infectious disease, into his own lot, adjoining the lot of another occupied by sheep, is not unlawful, nor such an act of wrong or negligence as will give to the owner of the adjoining lot a legal cause of action, for damage sustained in

consequence of the disease being communicated to his sheep. *ib*

See COMPTROLLER'S SALE.

EXECUTORS AND ADMINISTRATORS,
2, 8, 4.

SLANDER OF TITLE.

ACTS OF CONGRESS.

See CONSTITUTIONAL LAW, 1, 2.

ADJOINING OWNERS.

See FENCES.

ADULTERY.

See DIVORCE, 1 to 5.

ADVERSE POSSESSION.

1. The 86th section of the code, which enacts that for the purpose of constituting an adverse possession, by a person claiming title not founded upon a written instrument, or a judgment or decree, land shall be deemed to have been possessed and occupied in the following cases only: 1. Where it has been protected by a substantial inclosure; 2. Where it has been cultivated or improved, was intended to provide that a party claiming to hold adversely should protect his claim by the erection of a substantial inclosure, and the language employed

means that he shall erect an inclosure around the land, without relying upon a remote fence of a neighbor, inclosing that neighbor's land also. *Doolittle v. Tice*, 181

2. Although the claimant may avail himself of a fence upon the line, yet it was not designed that a fence located far away from the premises, and including other lands, should be used as a means of protection to a claim of this character. *ib*
3. It was also intended that the inclosure should provide fixed, certain and definite boundaries of the claim made, by which it might be designated, marked and known. *ib*
4. It must be an inclosure of the lot alone, upon the lines claimed by the party, and not embracing premises adjoining, extending, in part, a great distance from the lines. *ib*
5. To constitute a compliance with the 2d clause of the section the land must not only be cultivated but improved. *ib*
6. Reaping alone cannot be considered cultivating. Nor can the keeping up of a fence already made, mowing the grass, and cutting brush, be deemed an improvement, within the meaning of the statute. *ib*
7. The statute was intended to provide for the ordinary cultivation and improvement of lands in the manner in which they are usually occupied, used and enjoyed by farmers, for agricultural purposes, by sowing, plowing and manuring, and by the erection of buildings, &c. which may add to their value. *Per MILLER, J.* *ib*
8. The possession which will avoid a deed for champerty must be under claim of a title adverse to that of the grantor, in the deed sought to be avoided. A *cuius que trust* cannot claim to hold adversely under his own trustee. *Newton v. McLean*, 285

AGREEMENT.

1. An agreement by an insurance company to allow the maker of a note given for premiums, in advance, five per cent on the whole amount of the note, without deduc-

tion for such sums as may be written against, is illegal, and the note cannot be recovered on, by the company. *Chesbrough v. Wright*, 28

2. Where A. buys and pays for stock at B.'s request, on joint account, under agreement that B. shall pay him for the moneys advanced, A. holding the stock, in the mean time as a pledge for repayment, with a right to expose it for sale in the market, if upon notice B. refuses to pay for it, the agreement, though by parol, is not void by the statute of frauds. *Stover v. Flack*, 162
3. By a written contract between the parties, for the purchase by the defendants of a quantity of first sort hops, from the plaintiff, the hops were to be inspected and branded by S. and delivered in New York on or before the 20th of November, 1860, and paid for by draft on the defendants, at thirty days, &c. The hops were in fact inspected by S. and pronounced by him to be of the first sort, but were not branded as such by him. On the plaintiff's agent offering to telegraph to S. for permission to put his brand on the bales, one of the defendants said that they (the defendants) would not require it, or that it would make no difference. *Held* that the referee was right in holding as matter of law, that the defendants were estopped from insisting upon the omission to brand the hops, as a defense to an action for the price. *Clinton v. Brown*, 226
4. *Held*, also, that the written contract having made the inspection and determination of S. conclusive upon the parties, as to the quality or grade of the hops, the defendants could not be allowed to show, in such action, that the hops, when inspected by him, were of a quality inferior to that specified in the agreement. *ib*
5. Parties residing and doing business in the city of New York, there indorsed and procured to be discounted, a promissory note payable in Alabama. *Held* that the indorsement was a New York contract, and governed by the laws of New York. *The Artisans' Bank v. The Park Bank*, 599

6. By such an indorsement, the indorsers promise to pay the note in New York if, upon its being presented for payment in Alabama, payment is refused and they are duly notified of such demand of payment and refusal. *ib*
 7. Where a tenant agreed by parol, with his lessor, that he would turn out hay and grain to secure the payment of the rent reserved in the lease, if the lessor was afraid that she would not get her pay; the value of the property being over fifty dollars, and nothing being paid, and no receipt or credit actually given, or possession delivered; *Held* that the transaction rested in words merely, and no title passed. *Buskirk v. Cleveland*, 610
 8. Although an oral agreement to exchange one piece of real estate for another is void by the statute of frauds, yet if the parties have executed such an agreement, in part, and the plaintiff has fully performed to the extent of his agreement, and the defendant has accepted and retained all the advantages to be derived from such performance, it will not, after that, lie with him to refuse performance on his part and urge the invalidity of the agreement. *Bennet v. Abrams*, 619
 9. To permit a party to avoid the agreement, under such circumstances, on the ground of its invalidity, would be to make the statute of frauds an instrument of fraud, instead of a shield against it. *ib*
 10. Where possession has been taken by both parties under an oral agreement for the exchange of land, and one of them has fully performed on his part, and the fairness of the agreement is not assailed, he may maintain a suit in equity to enforce a specific performance of it by the other party. *ib*
 11. An executory contract for the exchange of lands is not merged in the deeds of conveyance. And if one of the parties to such a contract agrees to satisfy and discharge an existing mortgage upon his land, in addition to the execution and delivery of a deed, these are separate and distinct acts, and performance as to one will neither extinguish nor discharge the party's obligation in respect to the other. *ib*
 12. A stipulation or agreement entered into by the counsel for the respective parties on the trial of a cause, and in the face of the court, relative to the conduct of the suit and the proceedings therein, and entered in the minutes, is binding and conclusive upon the parties. *Staples v. Parker*, 648
 13. The rule which requires all agreements between parties and their attorneys, in respect to the proceedings in a cause, to be in writing, has no application to that class of stipulations. *ib*
 14. By a written agreement under seal between the plaintiff and defendant, the former agreed to sell and convey to the latter a farm of 400 acres, and to transfer to him certain personal property thereon, consisting of a great number of articles; which sale and transfer were not necessarily to be simultaneous acts. And the defendant agreed to pay and secure to the plaintiff the sum of \$7500 as the price or consideration of such sale and transfer. The parties then bound themselves, their heirs &c., in the sum of \$1000, that in case either party should, in any way, fail to fulfill or perform the contract, or any part or portion of it, then the party in default should pay unto the other the said sum, "the same being agreed upon by the said parties as actual and assessed damages, and the same to be paid without suit or litigation." *Held* that the sum named was intended by the parties as a penalty and not as fixed and liquidated damages. *ib*
- See LIMITATIONS, STATUTE OF, 6, 7, 12, 13.*
PARTICPES CRIMINIS.
PARTNERSHIP, 3.
SLANDER OF TITLE, 2.
TELEGRAPH.
- AMENDMENT.**
1. In exercising the power of allowing amendments "in furtherance of justice," no discrimination should be made, by the courts, between legal defenses offered to be set up, on ac-

count of their character. All defenses recognized by statute as being such—including those styled unconscionable, such as the statute of limitations, usury &c.—stand upon an equal footing in this respect. *Sheldon v. Adams*, 54

2. A party has a vested right to set up those defenses as well as any other, when they have become perfect. *ib*

3. Where promissory notes, given to an insurance company, have been sued upon as premium notes assessed, the complaint will not be allowed to be amended—after the notes have become outlawed, as stock notes—by inserting therein an additional claim and count upon them for the whole amount thereof, as stock notes given before the organization of the company and as constituting a part of its capital; the effect of which amendment would be to cut off the defense of the statute of limitations. *ib*

4. Nor will an amendment be granted by which a note liable to be assessed only for losses in one class of hazards, is permitted to be sued on as a stock note, and made liable for all losses. *ib*

5. An amendment of the complaint, not moved for until after eight years have elapsed since issue joined, nor until after the death of the original plaintiff, and the defendant's attorney, should not be granted, without sufficient excuse being shown. *ib*

See FRAUDULENT REPRESENTATIONS. PARTIES, 4.

APPEAL.

1. An order of a special term allowing a complaint to be amended by inserting therein an entirely new and different cause of action, which will require a different defense, involves the merits, and affects a substantial right, and is therefore appealable. *Sheldon v. Adams*, 54
2. An undertaking given on appeal to the general term on demurrer, was conditioned that the appellants would pay all costs and damages

which might be awarded against them on said appeal, not exceeding \$250, and also the judgment appealed from, *if the same should be affirmed*. Held, that there was no liability on the part of the sureties, until there was an absolute affirmation of the judgment. *Poppenhusen v. Seoley*, 450

3. The respondent must have the right to enter and collect a judgment of affirmation, before he can proceed against the sureties in such an undertaking. SUTHERLAND, J. dissented. *ib*

4. A mere order of the general term, affirming the judgment appealed from, except that the appellants have leave to answer the complaint, is not sufficient to authorize a recovery upon the undertaking. *ib*

From Commissioners of Highways. See HIGHWAYS.

ARREST.

See CONSTITUTIONAL LAW.

ASSESSMENT.

See INSURANCE (FIRE), 1, 2, 3, 4, 6.

ASSIGNMENT.

In trust for the benefit of Creditors. See DEBTOR AND CREDITOR.

In Bankruptcy, or Insolvent Proceedings. See ATTACHMENT.

ATTACHMENT.

1. It is now the settled law of this state that a prior assignment in bankruptcy, or under insolvent proceedings, in a foreign nation, or in another state of this union, will not be permitted to prevail against a subsequent attachment of the bankrupt's or insolvent's effects by a creditor residing here. *Kelly v. Crapo*, 603
2. Such an assignment will be regarded by the courts of this state as operating to transfer all the property of the bankrupt or insolvent

situated, at the time of the assignment, within the territory, or being under the dominion, of the nation or state where the proceedings were instituted. *ib*

8. But such an assignment will not transfer to assignees appointed in insolvent proceedings instituted in another state of this union, the title to a vessel registered there, and on the high seas, at the time, as against a subsequent attachment sued out by a creditor residing here. SUTHERLAND, J. dissented. *ib*

4. That comity which should exist and be liberally practised between all civilized nations, and more especially between sister states, forbids that our courts should go any further than they have already gone, in giving a preference to the claims of creditors of the bankrupt or insolvent, who are citizens of this state, in respect to property actually here. *ib*

5. The preference should not be extended in respect to property not within our jurisdiction at the time of the assignment, merely because it was not actually within the territorial limits of the other state, although virtually under the dominion of her laws as property. *ib*

See EXECUTORS AND ADMINISTRATORS.
INTERPLEADER.
PRACTICE, 1.
SHERIFF, 1, 2, 5.

ATTORNEY.

See PARTICIPE CRIMINIS, 6.

B

BANKRUPTCY.

See ATTACHMENT.

BANKS.

1. The fact that an individual is a member of the board of directors, and of the discount board, of a bank, will not, in the absence of any special authority to act as the agent of the

corporation, in a particular transaction respecting the discounting or renewal of a note, authorize him to make admissions or statements concerning such transaction, which will bind the bank. SUTHERLAND, J. dissented. *The East River Bank v. Hoyt*, 441

2. In the absence of any proof that the charter of a bank contains any restriction or limitation on the power of the bank to negotiate or indorse notes or bills of exchange, or on the authority of its cashier to indorse such negotiable paper for the bank, the presumption is that the bank has power, and its cashier authority, to indorse paper of that description. *Robt v. The Rose County Bank*, 586

3. Though it appears that a bill was indorsed by the cashier of a bank for the mere purpose of collection, or for some other special or limited purpose, such proof will not prejudice or affect the right of a *bona fide* holder for value, before maturity, to recover thereon against the bank; unless it be proved that he took the bill with notice of such special purpose, or under circumstances requiring him to make inquiry as to the purpose of the indorsement. *Per SUTHERLAND, J.* *ib*

4. Even though the bank had never owned the bill, or had any interest in it, that circumstance will not affect the right of an innocent holder for a valuable consideration, before maturity, to recover against the bank as indorser. *Per SUTHERLAND, J.* *ib*

5. The omission of a cashier, on indorsing a bill of exchange, to write, before or after his name and the name of his office, the words "for the ——— bank," will not preclude the holder from recovering against the bank as indorser. An indorsement as follows: "B. P. K., cash'r," will bind the bank of which B. P. K. is cashier. *ib*

6. A proceeding under the act of 1849, "to enforce the responsibilities of stockholders," &c. (*Laws of 1849, p. 343*.) is not barred by a previous judgment recovered in an action instituted under the revised

statutes, (2 R. S. 463, §§ 39, 40,) by a stockholder of the bank to compel the application of its assets to the payment of its debts. *Duncan v. Duncan*, 520

7. In a proceeding under the act of 1849 to enforce the individual liability of the stockholders of an insolvent bank, for the payment of its debts remaining after its assets are exhausted, executors are properly chargeable as holders of stock which appears on the books of the bank to have been held originally by their testator, and subsequently by them. *ib*

8. If a stockholder is living, and a resident of the county in which the notice to stockholders is published, at the time the publication commences, his death afterwards will not abate the proceedings, or render the publication ineffectual. *ib*

See PROMISSORY NOTES, 4, 5.

BILLS OF EXCHANGE.

See BANKS.

BILL OF SALE.

See EVIDENCE, 4, 5, 6, 8.

BONA FIDE PURCHASER.

See PARTNERSHIP, 5, 6.

BOND.

Bonds, issued by a rail road company, whether under its corporate seal or not, payable to A. B., or the holder thereof, are negotiable, and will pass by delivery. *The Connecticut Mutual Life Ins. Co. v. The Cleveland, Columbus &c. Rail Road Co.* 9

See INTEREST.

C

CASES DOUBTED, OVERRULED COMMENTED ON, &c.

1. The case of *The Bank of the State of New York v. The Farmers' Branch of*

the State Bank of Ohio (86 Barb. 332) overruled. *Robb v. The Ross County Bank*, 586

2. The case of *Lee v. Salbeck*, (22 Barb. 522,) commented on and explained. *The Artisans' Bank v. The Park Bank*, 599
3. The case of *Moyer v. Hinman*, (17 Barb. 139,) which holds that a judgment regularly docketed against the vendor of lands by an executory contract is a charge upon the land and binds the legal title, is not well supported by authority. (See S. C. 13 N. Y. Rep. 180.) *Per* POTTER, J. *Smith v. Gage*, 60

4. Dictum of Spencer, Ch. J. in *Wheaton v. Hibbard*, (20 John. 290,) overruled. *Porter v. Mount*, 561

CHAMPERTY.

See ADVERSE POSSESSION, 8.

CHATTEL MORTGAGE.

1. At law a mortgage or sale of future acquired personal property, the mortgagor neither having acquired the thing nor the agent of its production, at the time of making the contract, creates no valid subsisting property. But if the future acquired property be the product of present property in the mortgagor, as the wool growing on a flock of sheep, or the produce of a dairy, or a farm, or any thing of that character, the mortgage will take effect upon the property as soon as it comes into existence, and will be perfectly binding at law. *Conderman v. Smith*, 404
2. Where one purchases property covered by a chattel mortgage within a year after the mortgage is made and filed, the property will continue subject to the lien of the mortgage so long as the purchaser continues the owner, even though the year has expired without filing in the town clerk's office of a copy of the mortgage with a statement of the interest of the mortgagee in the property. *Wiles v. Clapp*, 645
3. One deriving title to mortgaged property from a purchaser who be-

within the year will stand in the same position as his vendor. *ib*

4. But if he merely takes the property for an antecedent debt, without paying or advancing any thing at the time, or giving up any security, he will not be regarded as a *bona fide* purchaser, or purchaser in good faith. *ib*

5. The re-filing of a chattel mortgage in the town where the mortgagor resides is only necessary to secure the lien against creditors of the mortgagor, and purchasers and mortgagees in good faith. *ib*

COLLISION.

See RAIL ROAD COMPANIES, 5, 6, 7.

COMMISSIONERS OF LOANS.

See PARTIES.

COMPLAINT.

1. In an action to recover back money paid on compulsion, or by duress of goods, the complaint should state the facts, and not a mere conclusion of law. The court must be able to see, from the facts stated, that the payment was in fact compulsory and compelled by duress of the party's goods. *Commercial Bank of Rochester v. The City of Rochester*, 841
2. It is not sufficient simply to allege, in a general way, that the payment was compulsory, and not voluntary. *ib*
3. It need not be stated, in a complaint, that the plaintiff has a legal capacity to sue. The want of such an allegation affords no ground of demurrer. *Per* LEONARD, P. J. *The Phenix Bank of the City of New York v. Donnell*, 571

See CORPORATIONS, 7, 8.

COMPTROLLER'S DEED.

See RELATION.

COMPTROLLER'S SALE.

1. If all the steps are legally taken, in assessing taxes and returning

them as unpaid, that are required, to give the comptroller power to advertise the land for sale, the omission of the town clerk, at town meeting, to give notice, according to the statute (1 R. S. 931, § 76, 5th ed.) that lists of the land advertised for sale by the comptroller, for unpaid taxes, have been deposited in his office, will not render all the other proceedings nugatory, and make void a title obtained under the sale. *Pierce v. Hall*, 142

2. One whose right to wild and uncultivated land purchased at a comptroller's sale for taxes has become absolute; who is entitled to a deed from the comptroller; and who has all the actual possession that it is usual to take of that species of lands, may, *if seems*, maintain an action against a stranger for carrying away logs therefrom. He may at least, by virtue of such possession, defend his title to the logs, or defeat an action brought against him by the trespasser, for their value. *ib*

CONSTABLE.

See JUSTICES' COURTS, 9, 13, 14.

CONSTITUTIONAL LAW.

1. The constitution of the United States extends the judicial power of the union to all cases in law and equity arising under the constitution, laws and treaties of the United States. And it has been decided that a case arises, within the meaning of this provision, as well when the defendant seeks protection under a law of congress, as when a plaintiff comes into court to demand some right conferred by law. *Jones v. Seward*, 269
2. Accordingly *held* that congress having, by the act of March 8, 1863, relating to *habeas corpus*, &c., provided that on suits being brought for any arrest, imprisonment &c. made "by virtue or under color of any authority derived from, or exercised by or under the president of the United States, or any act of congress," the defendant may remove such action into the circuit court of the United States, the court

in which the action is brought has nothing to do with the validity of the act of congress, as a defense to the suit. It is sufficient that the defense involves the construction and effect of a law of congress. *CLEGG, J.* dissented. *ib*

3. If the defendant, in an action for false imprisonment, sets up as a defense the orders &c. of the president, the question for the court is not as to the constitutionality of the fourth section of the act of congress, declaring that the order or authority of the president shall be a defense, in all courts, to any action for an arrest &c. made under or by color of the president's order, or any law of congress; but is as to the constitutionality of the fifth section of the act, authorizing the defendant to remove the action from the state court to the circuit court of the United States. *Per SUTHERLAND, J.* *ib*

4. And upon an appeal from an order denying a motion to remove the cause to the circuit court of the United States, the question is not as to the constitutional power of the president to order the arrest, imprisonment &c. or as to the constitutional power of congress to authorize the president to order the arrest, imprisonment &c. complained of; but it is as to the constitutional power of congress to give the circuit courts of the United States original and exclusive jurisdiction of the trial of actions for such arrests, imprisonments, &c. *ib*

5. In cases coming within the fifth section of the act of March 3, 1863, no application to the state court is necessary in order to give to the circuit court of the United States possession of the action; but if such an application is made and denied, the general term may, on appeal, direct an order to be entered transferring the cause to the circuit court of the United States. *ib*

CORPORATIONS.

1. Any improper condition imposed by one of the projectors of a company, before its organization, in respect to a loan to be made by it, will not invalidate the transaction

consummated after the company is organized; unless the company has adopted and ratified the act of its agent. *The Central Park Fire Ins. Co. v. Callaghan,* 448

2. On the 15th of September, 1855, a manufacturing corporation, by resolution, appointed K. its general agent and attorney, agreeing to pay him a salary of \$1000 a year, to commence on the first day of that month, besides expenses; but no time was fixed when the salary was to become due and payable. *Held* that the company did not contract a debt within the meaning of section 12 of the act of February 17, 1848, authorizing the formation of corporations for manufacturing and other purposes, for the salary of K. when they adopted that resolution. Nor did they contract a debt for his services from day to day, or month to month, as they were rendered; the statute speaking of "debts" existing or contracted, not of *liabilities* which may ultimately ripen into debts. *Oviatt v. Hughes,* 541

3. That K. was to be paid a price agreed upon, *by the year*, for his services; and there being no express stipulation as to the time when he was to be paid, he was not entitled to pay, by the terms of the resolution, until the expiration of a year from the time when the salary was to commence. But that the time of payment might be changed by a subsequent agreement terminating the employment and allowing K. compensation at the rate of \$1000 a year, for the time already elapsed. *ib*

4. *Held, also*, that the expenses of K., incidental to the business, were put upon the same footing as his salary, in respect to the time when they could be considered a debt against the company. And that upon the failure of the trustees to make the report required by the 12th section of the act of February, 1848, the corporation was to be deemed indebted to K. only for such expenses as he had paid or incurred up to that time. *ib*

5. A statute of another state, under which the plaintiffs claimed to have been incorporated, declared that persons associating under articles of

agreement according to the statute, and who should *comply with all the provisions* thereof, should constitute a body politic and corporate. It then provided that before any corporation so formed should commence business, the officers should cause the articles to be published in two newspapers, &c. *Held*, that a corporation might be such for all the purposes of bringing an action, without publication. *SUTHERLAND, J.* dissented. *Holmes v. Giltland*, 568

6. *Held*, also, that general reputation that the plaintiffs were conducting business as a corporation, coupled with the fact that the note sued on was payable to them, was sufficient evidence of the existence of the corporation to prevent a dismissal of the complaint, for want of proof of publication of the articles. *ib*
7. A corporation suing as such, need not allege in the complaint, that it is a corporation duly incorporated and has legal capacity to sue. *The Phenix Bank of the City of New York v. Donnell*, 571
8. Where a plaintiff sues by an appropriate corporate name, it is not necessary to expressly aver in the complaint that the plaintiff is a corporation; there being in such a case an implied averment in the complaint that the plaintiff is a corporation. *Aliter* in a suit by a corporation incorporated by the name of an individual. *Per SUTHERLAND, J.* *ib*

See JURISDICTION.

PRINCIPAL AND AGENT, 4, 5, 6.

COUNTER-CLAIM

1. The defense of usury is not a counter-claim within the meaning of the code. *Prouty v. Baton*, 409
2. Matter which shows that the plaintiff never had any cause of action, against the defendant, which the law would aid him in enforcing, is no counter-claim. *Per JOHNSON, J.* *ib*

COUNTY COURT.

See SPECIFIC PERFORMANCE, 4.

D

DEBTOR AND CREDITOR.

1. It being the duty of an assignee under an assignment to him in trust for the benefit of creditors, to take care of and protect the assigned property, he may maintain an action of trespass against any person who interferes therewith. *McQueen v. Babcock*, 387
2. The bringing of such an action by the assignee, against one who assumes to take the assigned property out of his possession, is in furtherance of his duty, and hence is not an intermeddling with the property improperly, or within the sense and meaning of an injunction order prohibiting him from "intermeddling with, receiving or collecting" any of the property of the assignor. *ib*
8. Such an injunction is no bar to a suit against a sheriff, for taking the assigned property out of the hands of the assignee; and if suit is not brought within three years, the statute of limitations will be a good defense. *ib*

DIVORCE.

1. Proof of adultery, alone, is not sufficient to authorize a judgment of divorce. It must be averred in the complaint that the adultery charged was committed without the consent, connivance, *privity* or procurement of the plaintiff; and the complaint must be verified by the oath of the plaintiff. *Myers v. Myers*, 114
2. Where a plaintiff, in his complaint, alleged that five years had not elapsed "since he discovered the fact that such adultery had been committed by the defendant without his consent, connivance or procurement;" *Held* that this averment was not a compliance with the above rule. *ib*
8. Upon a reference, in an action for a divorce, it is the duty of the referee to find not only as to the fact of adultery, but also as to all other material facts, such as connivance of the plaintiff, &c. *ib*

4. No one has a right to relief from a court for an injury which he was himself chiefly instrumental in effecting. Upon this principle, connivance by a plaintiff at the adultery of the defendant, destroys all claim to remedy by way of divorce, though the adultery be proved. *ib*
5. Circumstances considered as amounting to proof of the plaintiff's consent to, privity with, or connivance at, the adultery of the defendant. *ib*
6. The court will order any judgment for divorce, obtained by collusion or fraud, to be set aside, not from any regard to the parties concerned, but from motives of public policy. *Singer v. Singer*, 139
7. In such a case, however, it should be made apparent that the party moving is acting from good motives, and not from any expected personal advantage. *ib*
8. Where judgment for divorce, has been acquiesced in for the period of several years and the plaintiff has again been married, some better reason than the mere gratification of personal feeling on the part of the defendant, or the desire to obtain a further sum of money from the plaintiff, should be made clearly to appear, before the court would be warranted in granting such an application. *ib*
9. No ground of policy should suffice where the parties have acquiesced in the judgment for three years, and a third person has acquired rights by marriage. *ib*
2. The employee himself is bound to exercise all reasonable care and prudence, and if any injury results through his want of care, or through his own negligence combined with that of the employer, he has no right of action against the latter. *ib*
8. It is the duty of an employer to exercise care and prudence that persons in his employ be not exposed to unreasonable risks and dangers, and the employee has a right to understand that the employer will exercise that diligence in protecting him from injury. *ib*
4. Thus where the plaintiff, who was not a ship carpenter or joiner, or a mechanic of any kind, and knew nothing about the construction of scaffolding, or the forces it would be required to resist, was put into the hold of a gunboat, by his employer, a ship-builder, to remove the chips and rubbish underneath a scaffold; *Held* that he had a right to rely upon the superior knowledge of his employer, and upon his care and prudence that the scaffold was of sufficient strength to insure him against all harm. *ib*
5. *Held also*, that even though the plaintiff himself, in pursuance of his employer's orders, assisted in piling planks upon the scaffold, which fell, from the weight so placed upon it, whereby the plaintiff was injured, he was not chargeable with negligence contributing to the injury, so as to defeat a recovery against the employer. *ib*

EQUITY.

1. A release of the lien of a mortgage, though void at law if not under seal, may be enforced in equity. *Headley v. Goudry*, 279
2. A court of equity can give effect to parol contracts; and a release not under seal is equivalent to a parol agreement for a release of the premises described in it. *ib*
8. Relief is given in such cases, and imperfect contracts made effectual, where the party seeking such relief is clearly entitled to the intervention of the court; upon the

E

ELECTION.

See OFFICE AND OFFICER.

EMPLOYER AND EMPLOYEE.

1. An employer is responsible in damages to an employee, for an injury resulting from the employer's negligence. *Connolly v. Poillon*, 366

principle that what is agreed to be done is considered in equity as done when it ought to be done. *ib*

4. But where G. proposed to H. and S., to whom he and his wife had executed a mortgage that if they would release the mortgaged premises from the lien of the mortgage, he would make a general assignment to them of all the rest of his property, to which H. and S. assented, and they accordingly executed a release not under seal; whereupon G. executed an assignment to H. and S. of his property, but before doing so, he had, without the knowledge or consent of H. and S. assigned to his wife a demand held by him, against a third person, amounting to over \$1800; and he executed a mortgage upon the premises, to his wife, to secure a previous debt; *Held* that the assignment of such debt to the wife of G. was a fraud upon H. and S. for which the wife was responsible; and that in an action by H. and S. to foreclose the mortgage she could not claim to have the release established in her favor, except upon the relinquishment by her of the \$1600 debt so assigned to her. *ib*

5. The rule in equity is that, as between two parties having equal equities, the prior equity must prevail; but if the party having the subsequent equity clothes himself with the legal title before he has notice of the prior equity, such legal title must prevail. *Newton v. McLean*, 285

ESTOPPEL.

1. A person who does acts, or makes representations or admissions, designed to influence and which do influence the conduct of another, will be precluded from denying such acts and representations when such denial will operate to the injury of the person so influenced by them. *Lealey v. Johnson*, 859
2. Mortgagors, long after the execution of the mortgage, at a time when B. was about to become the assignee thereof, covenanted with him that there was due and unpaid, upon the mortgage \$27,222.20, and

that there was no set-off, defense or counter-claim thereto. Subsequently, by another instrument, they declared and affirmed that \$18,222.20 was still due and unpaid, for principal (\$9000 having been paid in the mean time.) These papers were left with B. and exhibited by him to the plaintiff as an inducement for the latter to purchase the bond and mortgage, one of the mortgagors telling him there was over \$18,000 of principal due, and assuring him he could have no better investment and no better security for his money. Confiding in these representations, the plaintiff took an assignment of the bond and mortgage and paid B. \$18,222.20 for principal, beside the arrears of interest. *Held* that the mortgagors could not be permitted afterwards, to deny what they had thus asserted to be true. That whatever might be the real estate of the mortgage debt and the sum really due and unpaid thereon, as to the plaintiff and those who might claim under him, the mortgagors were *estopped* from disputing that the money paid by the plaintiff was the true sum due and payable, at the time. *ib*

See AGREEMENT, 8, 4.

EXECUTION, 4.

HUSBAND AND WIFE, 8.

EVIDENCE.

1. *Generally; what is admissible.*
1. A copy of a judgment rendered by a justice of the peace, and of the proceedings to recover the same, signed by the justice with his official signature, and proved by the testimony of a witness to be a correct copy, must, in a collateral action, be regarded as proof of the rendering of the judgment, and of the various proceedings by which it was obtained. *Wilkinson v. Vorse*, 870
2. In an action to recover damages for a personal injury resulting in a loss of services, evidence showing how much the plaintiff was earning from his business, or realizing from fixed wages, at the time of the injury, is admissible. *Grant v. The City of Brooklyn*, 881

3. The testimony of a person employed by a mortgagee as his attorney and legal adviser at the time of taking a mortgage, in respect to the terms of the bargain between the mortgagors and the mortgagee, upon which the bond and mortgage were executed, is not liable to the objection that the bargain thus made was in the nature of a privileged communication between attorney and client. *Prouty v. Eaton*, 409
 2. To establish a lost or destroyed will. See WILL, 7, 8, 9, 10.
 3. Parol evidence; when admissible.
 4. A bill of sale in this form: "Mr. W. H. bought of B. S. & Brother," naming the articles purchased, and stating the price of each, signifies—especially when read in connection with the fact that the property was delivered under it—that B. S. & Brother have sold to H. the articles named, at the prices given. *Bonsteel v. Flack*, 435
 5. Such an instrument when not made and delivered as a receipt, but to show and evidence the terms of sale, by specifying the species, quantity and quality of the several articles, with the prices, and when it declares, on its face, a sale of the property—if accompanied by a delivery and acceptance of the property, becomes the evidence of the transfer of the title; and it cannot be contradicted by parol evidence that the transaction was not a sale, but only a *bailment*. *ib*
 6. Upon a sale of goods through a broker, the following sale note was signed by the broker: "Sold Mr. G. H. K. for account of Messrs. H. & E. about twenty tons *divi divi*, at \$45 cash per ton, to be put in bags and delivered as soon as possible." Held that the instrument was not so far complete as a contract on its face, as to exclude parol evidence of a warranty. *Koop v. Handy*, 464
 7. A well established exception to the general doctrine which regards all anterior and contemporaneous stipulations and representations as merged in the written contract, exists where one party sues another, alleging as the *gravamen* some fraud of the latter, by which the former was induced to enter into the contract. *ib*
 8. Where the *gravamen* of the complaint was fraud upon the sale of goods, by sample, through a broker; Held that parol evidence of the statements of the vendors to the broker, previous to the sale, respecting the quality of the bulk of the article as compared with the sample, was admissible; notwithstanding there was a memorandum of the sale, in writing, signed by the broker, which was silent as to quality of the article sold. *ib*
 9. Parol evidence is admissible for the purpose of showing to what debt an acknowledgment of the debtor applied. *McNamee v. Tenny*, 495
 10. Where a will is unambiguous, accurate and correct in respect to the location and identity of the lands devised, the person intended as devisee &c., parol evidence of extrinsic facts, such as that the country was a wilderness and the lands devised were wild and uncultivated, is inadmissible. *Charter v. Otis*, 525
 11. Evidence of the declarations of a testator, to show that a prior conveyance by him of a part of the same land to his daughter E. whose children were the plaintiffs, was a gift to her, is also inadmissible. *ib*
- See PRACTICE, 2, 8.
- ### EXECUTION.
1. A levy upon goods in a store, under an execution, is a continuing levy covering goods purchased by the judgment debtors subsequent to the levy and during the life of the execution, and placed in the same store; such goods being of the same general description as those levied on, and having been purchased to supply the place of goods sold by the debtors, after the levy, or as an addition to the original stock. *Roth v. Wells*, 194
 2. Goods and chattels of a judgment debtor, situated within the jurisdiction of the sheriff, are bound by

- the lien of the judgment from the time of the delivery of the execution, and no levy is essential to create such lien. *ib*
8. Goods levied upon, being in the custody of the officer, if a portion of them are removed and sold by the debtor, and others of a similar description are put in the same place, the property substituted takes the place of that which has been taken away, and becomes subject to the lien of the execution, without any new levy. *ib*
 4. If under such circumstances, the debtor refuses, when called upon, to designate the property which he claims is not covered by the levy, he will be estopped from maintaining an action against the sheriff to recover the value of property taken by him under the execution. *ib*
 5. Where goods levied on are left by the officer with the judgment debtor, and he confounds them with other goods, belonging to him, so that they cannot be distinguished, and the debtor refuses to point out the property levied on, he cannot complain if some of his own goods, not embraced in the levy, are taken by the sheriff. *ib*
 6. It lies with the party alleging that his property was exempt, under the provisions of the revised statutes, from sale on execution, to prove the facts affirmatively, which go to establish it. *Tuttle v. Buck*, 417
 7. Until it is made to appear what was the quantity and value of the necessary household furniture retained by a judgment debtor after a sale of his property upon execution, there is nothing from which any inference can be drawn as to whether the property levied on and sold was exempt or not. *ib*
 8. It is therefore erroneous for the judge, in an action brought by one who has purchased household furniture from a judgment debtor, against the sheriff for levying on and selling the same under execution against the vendor, to charge the jury that the evidence before them legally tends to prove that the property, when sold to the plaintiff, was exempt from levy and sale by the creditors of the vendor, and that they have the right from the evidence to find such to have been the fact; if in fact there was no proof tending to establish the exemption. *ib*
 9. Where liquors are delivered by liquor merchants, to a tavern keeper, to be by him retailed, the title to the property to remain in the liquor merchants until the property is sold, the liquors are liable to seizure and sale under executions issued against the tavern keeper. *Bonesteel v. Flack*, 486
 10. Where the assignee of a judgment knew, as did the sheriff also, that certain lands held by the judgment debtor and others as tenants in common had been voluntarily partitioned by the tenants among themselves, and quit-claim deeds executed in pursuance of the partition, and that the lots apportioned to and accepted by the judgment debtor were abundantly sufficient to satisfy the judgment with the expenses of sale, yet they proceeded to sell, on execution, the lots set off on such partition to the plaintiff, one of the joint tenants, wholly regardless of his rights and equities; *Held* that this was a fraudulent act, none the less reprehensible because committed under the guise of legal sanction; and that an action would lie against the holder of the judgment, and the sheriff, to set aside the sale, and cancel the sheriff's certificate. *Cantine v. Clark*, 629
 11. Although a party can obtain an order, in such a case, *it seems*, before the sale, directing the sheriff as to the mode of executing the process; or may obtain relief on motion, *after* the sale, he has also a remedy by direct action; and will be entitled to relief in such action, although *fraud* is not charged in terms, nor proved or found by the court; provided facts are stated, proved and found from which fraud is, in law, necessarily deducible. *ib*
- EXECUTORS AND ADMINISTRATORS.
1. Proceedings by attachment against executors are inapplicable for the

- purpose of compelling the settlement of the estate of the testator, or of enforcing payment by the executors, of an individual demand contracted by the testator, where the executors are not charged with any breach of duty, except a neglect to pay the debt. *Metcalf v. Clark*, 45
2. An ordinary action at law cannot be maintained, in this state, against foreign executors, as such, since the office of executor *de son tort* was abolished by statute. *ib*
 3. But this objection to the action is matter of defense. It cannot be urged on a motion to set aside the summons. *ib*
 4. Our courts will not recognize the right of a foreign executor or administrator *to sue* in the courts of this state under or by virtue of his foreign letters testamentary or of administration. *Middlebrook v. The Merchants' Bank*, 481
 5. But if foreign executors, with full authority to do so, transfer to another stock in a bank located here, and execute a power of attorney for its transfer on the books of the bank, the officers of the corporation are bound to recognize the assignee's title to the stock, and his right to have it transferred to him on the transfer books; and in case of refusal, the bank may be decreed to make the transfer, where there are no rights of domestic creditors to be affected. *ib*
- See* SUBROGATE, 1, 2.
- EXEMPT PROPERTY.**
- See* EXECUTION, 6, 7, 8.
- F**
- FALSE IMPRISONMENT.**
- See* CONSTITUTIONAL LAW, 3.
- FENCES.**
1. The provision of the statute (1 R. S. 858, § 80) directing that owners of adjoining lands shall each make and maintain a just proportion of the division fence between them, unless one of them shall choose to let his land lie open, was intended to apply to cases where lands have been partially fenced, as well as to those in which the owner chooses to let his land lie altogether in commons. *Chrysler v. Westfall*, 159
 2. The language of the statute includes any case where the owner does not choose to enclose his land entirely. *ib*
- See* ADVERSE POSSESSION.
- FORECLOSURE SUIT.**
- See* MORTGAGE, 6.
- FRAUD.**
- See* PARTICIPE CRIMINIS.
PARTNERSHIP, 4.
- FRAUDS, STATUTE OF.**
1. M. & C. being indebted to W. sold him a bill of goods, the price of which was not applied by receipt or otherwise to the debt, nor was there any proof of an agreement that it should be so applied, but on the contrary it appeared from the bill of parcels that the purchaser was to give a note at ten months, payable to his own order; *Held* that there was no payment of a part of the purchase money which would take the case out of the statute of frauds. *Wylie v. Kelly*, 594
 2. An agreement was made by M. & C. to sell a lot of goods in store to W.; a record of the sale was made; in M. & Co.'s book of original entries; a bill made out and delivered or sent to W.; the goods were set out, by themselves, on one side of the store, and an account taken of them; and W. consigned them to D. for sale on his account. *Held* that there was sufficient evidence of delivery and acceptance to go to the jury; and that the question of delivery should have been submitted to them. *ib*

FRAUDULENT REPRESENTATIONS.

A plaintiff alleged, in his complaint, that being the owner of a farm, he, on the 28th of April, 1868, conveyed the same to the defendant for the price or sum of \$11,000 which was paid in ninety shares of stock (of \$100 each) in the La C. and M. Rail Road Co. That the defendant falsely and fraudulently represented to the plaintiff that such stock was legally issued to the defendant and his partner, C., upon subscriptions fully paid, which representations were false and made fraudulently, with knowledge that they were false, and were made for the purpose of obtaining a conveyance of the land. The plaintiff then alleged that such stock was worthless and invalid, and was known by the defendant to have been issued at fifty cents on a dollar, in violation of the charter of the company, but that he fraudulently concealed that fact from the plaintiff. The plaintiff further alleged that the defendant, for the purpose of fraudulently inducing the plaintiff to exchange his farm for said stock, falsely represented that the said corporation was in a sound, solvent and prosperous condition, and was able to pay from its income large dividends, which representations the defendant, being its general fiscal agent, knew to be false; and that relying upon the truth of such representations, and the validity of the certificate of stock, the plaintiff executed the deed, and was thereby defrauded. *Held*, 1. That if there was any material variance between the pleadings and the proofs the court should have allowed an amendment of the complaint in conformity with the facts proved. 2. That although it was averred in the complaint that the plaintiff relied upon the fraudulent representations, as to the condition of the company, and that the certificate was valid, it was, not essential that both those allegations should be proved to be false. That if it appeared satisfactorily that the former was false and made for the purpose of inducing the plaintiff to make the exchange, this would be sufficient to establish the cause of action, and that the latter averment might be rejected as surplusage. 3. That assuming that the pleadings

were sufficient, or might have been amended, the judge at the trial erred in granting a motion for a nonsuit and in refusing to submit to the jury the question of fraudulent representations as to the soundness and solvency of the company. 4. That all matters bearing upon the question of fraudulent representations, or going to show that the statements of the defendant as to the condition of the company, and the value of its stock, were false, to his knowledge, were proper subjects for the consideration of the jury, to whom they should have been submitted by the judge. 5. That it was also a question for the jury whether the plaintiff, although he had some general knowledge of the character and responsibility of the corporation, was governed by the representations of the defendant, who was its financial agent and had been connected with its management, and had an intimate knowledge of its affairs. 6. That whether representations made by the defendant on the same day and only a short time before the agreement was executed, were designed to influence and did influence the plaintiff; and whether they were made in reference to the contract; were also questions which properly belonged to the jury to decide. *Yates v. Alden*, 172

G

GUARANTY.

1. Where a corporation indorses upon an interest-warrant, or coupon, issued by another company, a guaranty of payment, "for value received," it is not to be deemed an accommodation indorser or guarantor. The words "value received" import a sufficient consideration. *Connecticut Mutual Life Insurance Co. v. The Cleveland & St. Rail Road Co.* 9
2. An arrangement between several connecting rail road companies, entered into for the purpose of securing a uniform gauge of the several roads, and thus increasing the business and profits of each, forms a sufficient consideration for a guar-

anty by one of the corporations, of the payment of the coupons issued by another. *ib*

3. A guaranty of the payment of interest-warrants annexed to a bond may be valid, though the bond be void. *ib*

HIGHWAYS.

1. After an appeal from the determination of commissioners of highways in laying out a highway has been heard before the referees appointed by the county judge to decide such appeal, and submitted to them for their decision, they have no power to reopen the case and receive further testimony. *The People ex rel Robinson v. Ferris*, 121

2. After the matter of the appeal has been submitted by the parties to the referees, their power for further hearing is at an end. The only power then left to them is to decide; which includes the incidental powers of adjourning from time to time, for that purpose, and to sign and cause to be filed the evidence of their decision. *ib*

3. Where the legislature, by special statute, declares that all streets, roads and alleys in a particular village which have been worked and improved and which are now used as such, shall be deemed public highways, the character of the streets, roads and alleys, and whether highways or not, is thenceforth to be determined not by the rules of the common law or the general statutes relating to highways, but by inquiring simply whether, as a matter of fact, any particular street or alley comes within the provisions of the statute. *Hickock v. Trustees of the Village of Plattsburgh*, 130

4. Overseers of highways, acting under the general authority of the trustees of a village, who are by law commissioners of highways, and without directions as to the specific application of labor, under their warrants, may create a liability on the part of the trustees, by applying the labor to the improvement of a particular street. *ib*

5. Unless such acts of the overseers are repudiated or disavowed by the trustees they will be presumed to have ratified them. *ib*

6. The question whether a *coul de sac*, or a road or street which is closed at one end, and only communicates with a public road or street at the other, can be a *highway*, discussed. *ib*

HUSBAND AND WIFE.

1. The power conferred upon married women to *devise* real and personal estate, by the act of April 11, 1849, amending the act of April 7, 1848, for the more effectual protection of the property of married women, was not repealed by the act of March 20, 1860, concerning the rights and liabilities of husband and wife. *Wallace v. Bassett*, 92

2. Deeds of present separation, between husband and wife, are valid so far as relates to the trusts and covenants by which the husband makes provision for the wife, and the indemnity given to the husband by the trustees. Such covenants are mutual and dependent. *ib*

3. By articles of separation, between husband and wife, the former covenanted that the latter might enjoy all her estate, goods, &c. that belonged to her when she was married; and that he would not claim or demand any property which she should thereafter own, or which should be devised or given to her, or which she might otherwise acquire; and he conveyed to the trustees certain real and personal property and agreed to convey other real estate, in trust for the wife's support. The trustees agreed to take the estate so conveyed and to be conveyed, in full satisfaction for the support and maintenance of the wife; and the property was to be disposed of as the wife and the trustees might deem proper. The trustees also agreed to indemnify the husband against the wife's debts or the expenses of her support &c. The husband afterwards conveyed to the trustees the real estate agreed to be conveyed. *Held* that the husband was *estopped* by the covenants in the deed of separation, from

- claiming, after the death of the wife, a life estate in the land so conveyed by him to her, under the tenth section of the act of March 20, 1860, as her survivor. *ib*
4. A married woman, having a separate estate in lands, but not in the rents and profits thereof, not conducting any business on her own account, cannot charge such separate estate by a parol promise to pay the debt of her husband, where her separate estate has received no benefit on account of the contracting of the debt, and will not be benefited by the payment of the debt. *Ledlie v. Vrooman*, 109
5. Where a married woman, having a separate estate in lands, conveys the same by deed with covenants of seisin and against incumbrances, she is bound by the covenants, and liable for a breach thereof; such covenants being directly beneficial to her separate estate, inasmuch as their effect is to assure the title and enlarge the purchase money. *Kells v. DeLoyer*, 208
6. Since the act of 1848, in relation to the rights of married women, when the wife is in possession of property under claim of ownership, her rights as owner cannot be overlooked without evidence, any more readily than if she were unmarried. *Peters v. Fowler*, 467
7. The statute has worked this change; and instead of an adverse presumption that the property connected with a business which she carried on before her marriage, and which she claimed to own as a single woman, with the property in her possession, belonged to the husband, the presumption is now in her favor, and must be overcome by the party who disputes her right or title. *ib*
8. The fact of coverture has ceased to have any relation to the technical right of a married woman to maintain an action in respect to her separate property; and the allegation of coverture, in the complaint, is no longer necessary. *ib*
9. A husband may be liable for necessities furnished to the wife, in certain cases, though the existence of an agency or assent, express or implied in fact, is wholly disproved by the evidence; and this upon the ground of an agency implied *in law*, though there can be none presumed in fact. *Cromwell v. Benjamin*, 558
10. A husband is legally bound for the supply of necessities to his wife, so long as she does not violate her duty as wife. He may discharge this obligation by supplying her with necessities himself or by his agents, or by giving her an adequate allowance in money; and then he is not liable to a tradesman who, without his authority, furnishes her with necessities. *ib*
11. But if he does not himself provide for her support, he is legally liable for necessities furnished to her by tradesmen, *even though against his orders*. *ib*
12. Where goods have been thus furnished by a tradesman, the only questions to be considered are, whether the husband failed to provide suitably for his wife's support, and whether the articles sold by the plaintiff were necessities. *ib*
13. And if there is *some* evidence to sustain the finding of a referee, upon those questions, his decision will be conclusive. *ib*
14. An action may be maintained by a borrower, against husband and wife jointly, to recover back money paid as usurious interest, where the money loaned, and the security taken therefor, belonged exclusively to the wife, as a part of her legal estate, and the money taken for the loan and forbearance was paid to and received by her, and the husband, so far as he participated in the transaction, acted for her and with her knowledge and assent. *Porter v. Mount*, 561
15. Under the provisions of the acts of 1848 and 1849 for the more effectual protection of the property of married women, a married woman, having a separate legal estate consisting of money, may lend the same, take and hold securities therefor in her own name, and sue for and enforce them at law. And the power to do these things in-

cludes the ability to make all the contracts incident thereto. She is not exempt from the liabilities which the law imposes upon all other lenders of money. *ib*

I

INJUNCTION.

See DEBTOR AND CREDITOR, 2, 8.
PRACTICE, 5, 6, 7, 8.

INFECTIOUS DISEASES.

See ACTION, 4.

INSOLVENT.

See ATTACHMENT.

INSURANCE, (FIRE.)

1. An assessment made by an insurance company upon its premium notes, which includes the amount of a previous assessment for losses that have been paid, is invalid and cannot be collected. *Cooper v. Shaver*, 151
2. Premium notes, constituting the capital and being regarded as assets of a mutual insurance company, are ultimately liable for the payment of debts of all classes. It is therefore proper to assess them to pay losses on cash or stock policies issued by the same company. *ib*
3. Where it appeared that several years prior to the appointment of a receiver an insurance company had no funds to pay losses; and the order of reference directed the referee to ascertain the amount of debts &c., and to make an assessment to pay such debts; *Held* that it was a fair and legitimate inference that the cash premiums were exhausted, and that a necessity for resorting to the premium notes existed. *ib*
4. The provision contained in section 13 of chapter 466 of the laws of 1853, requiring notice of an assessment upon premium notes to be published for three weeks, by the secretary of the company, is merely directory, and the publication of such a notice is not a condition precedent to a recovery of an assessment by a receiver of the company. *ib*
5. After sequestration the corporate powers of an insurance company are suspended, and there is no such officer to perform that duty. Hence that provision cannot be literally carried out. *Per MILLER, J.* *ib*
6. Actual notice of the assessment is the main thing. And if demand of the amount be made, by the receiver, before the commencement of a suit therefor, this is sufficient. *ib*
7. A lease, executed by the mayor &c. of New York to R. and others was upon the condition that the lessees should erect on the demised premises such a building as was described in a certain petition and resolution; and at the expiration of the term quit and surrender the premises in as good state and condition as reasonable use and wear thereof would permit. The rent reserved was nominal only. *Held* that the future ownership by the lessors, of the building to be erected by the lessees, was in the contemplation of the parties at the time the lease was executed; and that at the expiration of the term the lessors became the owners of the superstructure which had been erected in pursuance of the conditions of the lease, and had an insurable interest therein. *Mayor &c. of New York v. The Brooklyn Fire Ins. Co.* 231
8. *Held, also*, that the lessors having been in possession of the building erected by the lessees, under a claim of ownership, at the time of procuring an insurance by them upon the same, the insurers could not be allowed, in an action on the policy, to dispute the lessor's interest in the building; even if the title was acquired by an act constituting a trespass as against the lessees, or their receiver. *ib*
9. Verbal statements, made by the agent who effects an insurance for the owner of the property, in respect to the future occupation of the building, are not admissible in

in evidence in an action upon the policy, inasmuch as such evidence would tend to vary the operation and effect of the language contained in the policy. *ib*

10. If there is any warranty as to the future use or occupation of the property insured, it must be contained in the policy or be reduced to writing in proper form, before it can be admitted to affect the construction or obligation of the policy. *ib*

11. Where the property described in a policy, and the purposes to which it is dedicated, sufficiently indicate the character and nature of the articles to be kept there, and the business to be transacted, and the nature and extent of the risk must have been known to the insurers to embrace articles and pursuits specified as hazardous, extra-hazardous and special hazards, the carrying on of a business, in the building, denominated hazardous or extra-hazardous or specified in the memorandum of special rates, without permission of the insurers, will not vitiate the policy. *ib*

12. Where an agent of an insurance company, authorized to effect insurances on vessels, &c., and to procure policies from the company and deliver them to the insured, receives and accepts an application, and negotiates an insurance, as agent, on property of which he is one of the owners, and communicates the transaction to his principal, without disclosing his interest in the property, and on receiving a policy from the company, delivers the same to the insured, such policy is void. *Ritt v. The Washington Marine and Fire Ins. Co.*, 353

18. It is the duty of an agent of an insurance company to acquire the proper information, and make the necessary examination, to lead to an intelligent decision upon the acceptance or rejection of the risk offered. The company has a right to the exercise of the agent's disinterested skill, diligence and zeal, for its own exclusive benefit. *ib*

14. And while acting as agent, he cannot at the same time take upon himself incompatible duties and characters; or become agent in a

transaction, where he has an adverse interest or employment. *ib*

15. An insurance, produced in that manner, is not avoided on account of the materiality of the relation of the agent to the risk, but because it is against public policy to allow such agreements to stand. *ib*

16. Even if it could be shown that the relation was not material to the risk, the insurance would be void. *ib*

INSURANCE COMPANIES.

1. An insurance company, although authorized to receive notes for advanced premiums to be written against, and to allow a certain interest thereon, is not authorized to allow five per cent on the whole amount, without deduction for such sums as may be written against. *Chesbrough v. Wright*, 23

2. After the existence of an insurance company is once established according to the provisions of the statute, upon proper evidence, its validity cannot be questioned, or its legal existence denied, by any of its members. *Cooper v. Shawer*, 151

8. Persons who have given premium notes to a mutual insurance company, and have thus become members of the corporation, are not in a condition to assail the organization of the company. *ib*

INTEREST.

If interest coupons, annexed to a bond issued by a rail road company, are not paid, when due, interest should be allowed, by way of damages for non-payment. *The Connecticut Mutual Life Ins. Co. v. The Cleveland, &c. Rail Road Co.*, 9

INTERPLEADER.

1. A debtor who has been served with a notice that an attachment has been granted against the property of his creditor, has no standing in court to interplead his creditor and the plaintiffs in the attach-

ment. *United States Trust Co. v. Wiley*, 477

2. Where a trust company received a sum of money in deposit, and issued a certificate to the depositors, by which it agreed to allow interest at the rate of four per cent, and to repay the sum deposited, to the depositors or their assigns, with interest, on sixty days' notice; *Held* that the company could not bring a suit to compel the depositors, and creditors who had attached the fund in the plaintiffs' hands, to interplead in respect to their respective rights and equities in the fund. *ib*

J

JUDGE'S CHARGE.

See PRACTICE, 8.

JUDGMENT.

A justice of the peace rendered a judgment in favor of the plaintiff for \$98 damages and \$4.65 costs, in all \$102.65, and duly entered it in his docket. A few days afterwards, discovering that he had by mistake made his costs 69 cents less than he was entitled to, he undertook to correct the error by setting that sum underneath the original footing and adding them together, without erasing or altering any part of the original docket. But afterwards, finding that it was illegal to alter a judgment, he erased the addition and thus restored the docket to its original form. *Held* that these alterations did not make the judgment void. That being made after the time limited by statute for the justice to render judgment and enter it in his docket, they were clearly void acts, as much as if they had been done by a stranger; and being void they could not affect the judgment. *Dauchy v. Brown*, 555

See DIVORCE, 6, 7, 8, 9.

EVIDENCE, 1.

JUSTICES' COURTS, 8, 4, 8, 11, 12, 15.

MALICIOUS PROSECUTION, 1, 2, 3, 4.

JURISDICTION.

Where bonds and coupons, though executed in the state of Ohio, are pay-

able in the state of New York, the cause of action arises here, and this court has jurisdiction, though both parties are foreign corporations. *The Connecticut Mutual Life Ins. Co. v. The Cleveland &c. Rail Road Co.*, 9

See JUSTICES' COURTS, 4, 5, 6, 7, 8.
SPECIFIC PERFORMANCE, 4, 5.

JUSTICES' COURTS.

1. The limitation of time, in the statute directing that justices of the peace shall render judgment and enter the same in their dockets within four days after the submission of the cause, was intended for the convenience of the parties and the protection of their rights; and a compliance with the statute may be waived by them. *Barnes v. Badger*, 98
2. When any act is deferred beyond the time limited in the justices' act, by the consent of the parties, it is no error that the act is done after the time specified in the act, if done within the agreed time. *ib*
3. Where parties submit their cause to the justice, and stipulate with each other that the justice may take five days instead of four, to render judgment, *it seems* they will be *estopped* from ever alleging in a court of justice, as a ground of error, that the judgment was rendered on the fifth instead of the fourth day. *ib*
4. A justice of the peace issued a summons, on the 28th of November, 1856, returnable on the 5th of December, then next, at *one o'clock P. M.*, which was duly served and returned. On the return day the justice, by mistake and supposing that the summons was returnable at *nine o'clock A. M.*, called the action at 10 o'clock A. M. and tried the same upon the testimony, and rendered a judgment in favor of the plaintiff. *Held* that the judgment was void for want of jurisdiction, and constituted no bar to a subsequent action for the same cause. *Sagendorph v. Shull*, 102
5. The day and hour fixed in the summons for its return is the period when the justice takes *jurisdiction* of

- the action*, and not the time when he issues the summons. At the return day he is to receive the complaint, which shows the cause of action; and at that time the question of jurisdiction of the action is judicially determined. *ib*
6. The authority exercised by the justice, previous to that stage of the cause, in issuing the summons, is merely ministerial. *ib*
7. When a legal summons, issued by a justice of the peace, has been duly served and returned, the justice, after waiting an hour from the time named in the summons for the appearance of the parties, obtains jurisdiction of the person of the defendant, whether he be present or not. *ib*
8. If justices proceed without having acquired jurisdiction over the parties in the form and in the manner required by law, any judgment which they may render will be absolutely void. *ib*
9. A venire should not be delivered to a constable, by a justice of the peace, until the parties have had an opportunity to make all reasonable objections to such officer. *Rice v. Buchanan*, 147
10. Where a venire was issued by a justice on the demand of the defendant, out of court and in the absence of the plaintiff, and was delivered to a constable without the knowledge of the plaintiff, or any notice to him of the application therefor; *Held* that the justice was right in setting aside the venire, and the panel of jurors, returned by the constable, and in issuing a new venire. *ib*
11. A judgment rendered by a justice of the peace who is related to either of the parties is absolutely void. *Schoonmaker v. Clearwater*, 200
12. The statute having declared that no judge of any court "can sit" in such a case, all the acts of the justice are *coram non judge* and of no effect whatever; and this although no objection was made to the exercise of jurisdiction, at the trial, and no proceedings have been had to set aside or vacate the judgment. *ib*
13. One serving a summons issued by a justice of the peace under a special authority given to him by the justice, is to be deemed a constable *quoad* the action, and is prohibited from appearing and acting as counsel for the plaintiff on the trial. *Wilkinson v. Vorce*, 870
14. His appearance on the trial is an error for which the judgment and proceedings will be reversed, on appeal. But it will not affect or take away the jurisdiction and authority of the justice to proceed in the action. *ib*
15. The justice having acquired jurisdiction of the person of the defendant, and become completely possessed of the action, by the issuing and service of a summons in the manner required by law, his judgment, rendered in such action, will, until reversed, be valid and effectual, and good authority for the issuing of an execution, notwithstanding such irregular appearance for one of the parties. *ib*

See JUDGMENT.

L

LEASE.

A lease, not purporting to reserve to the lessor the products of the farm, but merely providing that the lessor shall have a lien as security for the rent, upon all the goods, wares, chattels, implements, fixtures, tools and other personal property which are or may be put upon the demised premises, if it could be construed a chattel mortgage, would be void for uncertainty; as not identifying any particular property, so that it can be known to what it was intended to apply. *Bushirk v. Cleveland*, 610

See INSURANCE, (FIRE,) 7.

LIMITATIONS, STATUTE OF.

1. An acknowledgment, to take a case out of the operation of the statute of limitations, need not express any

- intention to pay the debt. An intention to pay is to be presumed. *McNamee v. Tenney*, 495
2. If the debtor acknowledges the existence of the debt, in writing, the provisions of the law are met, and the statute of limitations will not attach. *ib*
 3. What is a sufficient identification of the debt, in the acknowledgment. *ib*
 4. In the absence of proof that other demands existed, to which the acknowledgment of the debtor might apply, the presumption is that it applied to the demand proven. *ib*
 5. To remove any uncertainty or doubt upon that subject, parol evidence is admissible. *SUTHERLAND, J. dissented. ib*
 6. In October, 1855, H. being indebted to P. in the sum of \$26.50 for a set of tomb-stones, arranged with S., a debtor of his, that S. should pay that sum to P. upon delivery of the stones. But P. being indebted to the plaintiff upon a promissory note dated January 30, 1854, payable one day after date, P. agreed with the plaintiff that the latter might receive from S. the price of the stones, and apply the amount thereof upon the note, and P. thereupon delivered the stones to the plaintiff for S., who had previously consented that the parties might make this arrangement, and had notice that it was made, and assented to it soon after it was made. *Held* that the effect of the transaction was to substitute S. in the place of P. as debtor to the plaintiff, for the price of the stones, and that it operated *in presenti*, as a payment of such price, upon the note. *Butts v. Perkins*, 509
 7. *Held* also, that the agreement canceled \$26.50 of P.'s indebtedness on the note, as of the date of the delivery of the stones, and that the plaintiff should have indorsed that sum on the note, as of that date, although he did not receive the same from S. until April 1, 1856. *ib*
 8. And that as the \$26.50 ought to have been paid by S. and received by the plaintiff, at the time of the delivery of the stones, the payment of that amount upon the note—so far as the question of the statute of limitations was concerned—should be considered as made and received at that time. *ib*
 9. The statute which authorizes a party paying usurious interest for the loan or forbearance of money, to sue for and recover the excess, within *one year* next after such payment, is cumulative, and does not take away the common law remedy of the borrower to recover such excess in an action for that purpose, which may be brought at any time within six years. *Porter v. Mount*, 561
 10. The borrower's common law right of action is not *absolutely* suspended during the three years given to the overseers or superintendents of the poor for suing, by the statute, but he may sue during that period *provided* neither of such officers has previously sued for the same matter, and not otherwise. *ib*
 11. If an action has been brought by those officers, previously, it is the duty of the defendant, in an action brought by the borrower, to show that fact, affirmatively. *ib*
 12. Section 110 of the code of procedure, which requires that a promise, to take a case out of the operation of the statute of limitations, shall be in writing, is not applicable to cases where the right of action had accrued previous to the adoption of the code. *Coe v. Mason*, 612
 13. Accordingly *held* that parol promises made in 1851 and 1856, to pay a debt which existed and was in full force at the time the code took effect in 1848, were sufficient to take the case out of the statute of limitations; the case coming within the exception of section 73 of the code. *MORGAN, J. dissented. ib*
 14. The legislature intended to confine the operation of section 110 of the code to new liabilities, and not to include pre-existing ones which had been already barred by the statute. *Per FOSTER, J. ib*
 15. The "right of action," spoken of in the 73d section of the code,

which excepts from the operation of section 110 actions already commenced, and cases "where the right of action has already accrued," means the right of action upon the original obligation, and not the right of action upon the new promise. *ib*

See AMENDMENT, 1, 2, 3.
DEBTOR AND CREDITOR, 8.

M

MALICIOUS PROSECUTION.

1. A judgment in favor of a plaintiff in a justice's court, after a trial upon the merits, is sufficient evidence of probable cause to defeat an action against him for malicious prosecution, although on appeal to the county court it is reversed, upon another trial. *Palmer v. Avery*, 290
2. It is not however conclusive evidence of probable cause, but may be impeached for fraud, conspiracy, perjury, or subornation. *ib*
3. Where no such evidence is offered to impeach the prior judgment, it is the duty of the court to order a nonsuit. *Bacon, J. dissented. ib*
4. The plaintiff is not competent to prove by his own oath, against that of the defendant, that the former judgment was obtained against him by the perjury of the defendant, when the question depends upon their credibility as witnesses. *ib*
5. Where two actions had gone down in consequence of the plaintiff's failure to appear before the justice at the adjourned day, and a new action has been commenced before another justice for the same demand, which is still pending, the litigation is not terminated; and want of probable cause cannot be inferred solely from the discontinuance of the former suits. *Per Bacon, J., Foster, J. concurring. ib*
6. Where such new suit, after a full and fair trial upon the merits, resulted in a judgment in favor of the plaintiff, it furnishes sufficient evi-

dence of probable cause to defeat an action brought by the defendant therein against the plaintiff for malicious prosecution of the prior suits. *Per Morgan, J., Foster, J. concurring. ib*

MARRIED WOMEN.

See HUSBAND AND WIFE,

MERGER.

See MORTGAGE, 1.

MORTGAGE.

1. On the 7th of December, 1857, P. executed a bond and mortgage to B., and on the 26th of July, 1858, P. and wife conveyed the mortgaged premises to D. subject to the mortgage, D. assuming and covenanting to pay the mortgage as a portion of the purchase money. D. afterwards, and previous to July 26, 1859, paid the mortgage to the mortgagee, but satisfaction was not acknowledged. On the 26th of July, 1859, the bond and mortgage were delivered by B. to D. together with an assignment executed with a blank for the name of the assignee. On the 30th of July, 1859, D. delivered the bond and mortgage and assignment to K. & P. as collateral security for his stock note for \$1500 therewith delivered to K. & P. receiving from them, at the same time, his protested draft for \$1500, then held by K. & P. On the 30th of August, 1859, the name of the plaintiff was inserted in the blank left in the assignment, and the same, together with the bond and mortgage, were re-delivered to the plaintiff, in trust for the firm of K. & P. of which he was a member, D. receiving therefor his stock note for \$1500, and the firm cancelling debts and evidences of debt they held against him for the remainder of the amount nominally or apparently due on the bond and mortgage, and on the same day the assignment was duly recorded. On the 8th of September, 1859, D. conveyed the mortgaged premises to the defendant A. in fee; the deed stating on its face a consideration

- of \$8000. *Held*, that there was no necessity, if there was a place, for the doctrine of *merger*. That the mortgage debt having been paid by D., the owner of the fee, who had assumed and covenanted to pay it, such payment was a satisfaction of the mortgage debt, and *extinguished* the lien and vitality of the mortgage as fully as payment by P. the mortgagor would have done; whatever might have been the intention of D. and B. And that it was not in the power of D. and B., by any arrangement between them, to keep the mortgage alive, for the benefit of the party making the payment. LEONARD, J. dissented. *Kellogg v. Ames*, 218
2. A release of the lien of a mortgage, though void at law if not under seal, may be enforced in equity. *Headley v. Goundry*, 279
3. Where one conveys land to another by deed absolute on its face, and the grantee, while thus apparently invested with the legal title, mortgages, the land to a third party for a valuable consideration, the title of the mortgagee cannot be divested by proof that the grantee in the deed held the premises merely in trust for another, without any interest therein, at the time he assumed to execute the mortgage thereon. *Newton v. McLean*, 285
4. To overreach the mortgage so given by the holder of the legal title, which vests the mortgages with a legal estate in the premises, the person claiming to be the equitable owner of the premises is bound to go further than simply to show his prior equity. He must show that the mortgagees had notice of such prior equity, before advancing the consideration for the mortgage. *ib*
5. Payment and discharge of a mortgage given as collateral security for the payment of a prior mortgage, operates as a payment upon the principal debt. *Prima facie* there is nothing else upon which the mortgage paid can apply. *Prouty v. Eaton*, 409
6. Although the defendants, in an action to foreclose a mortgage, fail to set up in their answer, distinctly, the defense of payment, alleging merely an accord and satisfaction, and that nothing remains due, yet if evidence showing that the debt has been paid, is received, without objection, the defendants are entitled to the benefit of such proof. *ib*
- See EQUITY, 1.
ESTOPPEL, 2.
- MUNICIPAL CORPORATIONS.
1. The streets of a great city being in constant use by passengers, during the night as well as day, if the municipal corporation undertakes a work—such as the construction of a sewer—which necessarily renders the street unsafe for night travel, it is bound to avert the danger to passengers by special precautions, such as signal lights and barriers, and even more than these, should they prove ineffectual. *Grant v. The City of Brooklyn*, 381
2. Where a municipal corporation, in opening a sewer in a street, threw the earth upon the side-walk usually traveled by foot passengers, and left it there during the night, without any signal light or barrier, or protection erected around or near it, to warn or turn passengers away from the danger, and the plaintiff, while passing along the side-walk at night, in consequence of the obstructions, fell into a hole and was injured; *Held* that the corporation was guilty of negligence to which the plaintiff had not contributed, and was liable for the injury occasioned thereby. *ib*
- See HIGHWAYS, 3.
- N
- NEGLIGENCE.
- See EMPLOYER AND EMPLOYEE.
MUNICIPAL CORPORATIONS.
RAIL ROAD COMPANIES, 5, 6, 7.
- O
- OFFICE AND OFFICER.
- The act of April 12, 1856, (*Laws of 1856, p. 285.*) relative to common

schools, required the board of supervisors of the several counties to meet on the 8d day of June in that year, and elect a school commissioner, for each assembly district, who should hold his office until January 1, 1858. Section 7 directed that at the general election to be held in 1857, "and every three years thereafter," there should be elected a school commissioner for each assembly district, who should enter into office on the 1st of January, 1858, and should hold office for three years and until his successor should have qualified &c. Section 9 authorized any commissioner to resign his office, and for the appointment by the county judge of a successor to fill the office till the next general election thereafter. A vacancy occurring in the office of school commissioner in Chemung county, in September, 1862, by the resignation of the incumbent, whose term of office would have expired on the 31st of December, 1863, M., was appointed by the county judge, to fill the vacancy. At the general election in November, 1862, McK. was duly elected to that office, without any thing in the notice of election to show that it was to fill a vacancy; and he immediately entered upon the duties of the office. At the general election in November, 1863, M. was elected to the said office, and on the 1st day of January, 1864, claimed to hold the same, and to enter upon the duties thereof, while McK. claimed still to hold the office. *Held*, 1. That the appointment of M., in September, 1862, to fill a vacancy, only entitled him to hold the office till the general election in November thereafter. 2. That the vacancy in the office, occurring in September, 1862, did not change the time of electing the commissioner, so that one was not thereafter to be elected "every three years," dating from the general election in 1857. 3. That section 9 of the statute should be construed as relating exclusively to vacancies, and the filling of them; and that there was no incongruity between it and section 7. 4. That McK.'s election in 1862 must be deemed to have been only for the vacancy, and that his term of office commenced at the date of such election,

and expired on the last day of December, 1863; and that M. was duly elected at the general election in 1863, for the term of three years, commencing on the 1st day of January, 1864, and was entitled to the office, with the fees and emoluments from that time. *People ex rel. Marshall v. McKinney*, 515

See SHERIFF.

P

PARENT AND CHILD.

The liability of a father to furnish necessities for his minor and invalid children who are members of his family and unable to support themselves by their labor, depends upon principles analogous to those which govern the relation of husband and wife. *Cramell v. Baymain*, 558

PARTICEPS CRIMINIS.

1. C. having obtained from F. and his wife, without consideration, a conveyance of a farm, upon a parol promise or agreement to take and hold the title until F.'s debts were arranged or paid, and then to convey the land to F.'s wife; *Held* that he could not resist the claim of F. and wife that the parol agreement be specifically executed, on the ground that the conveyance was made by F. to hinder, delay and defraud his creditors; or on the ground that the agreement was within the statute declaring all parol trusts relating to land void. *Freelove v. Cole*, 818
2. If parties engaged in the perpetration of a fraud or concurring in the fraudulent purpose, as *particeps criminis*, are *in pari delicto*, neither can have relief, as against the other, at law or in equity. *ib*
3. But as there are degrees of crime and of wrong, the courts can and do give relief in many cases, as against the more guilty party. *ib*
4. To exclude relief, in such cases, the parties must not only be *in delicto*, but *in pari delicto*. *ib*

5. Where the parties to a conveyance did not stand on an equal footing, the grantor being infirm of mind and incompetent to manage his business affairs with ordinary prudence and discretion, and the grantee was his son in law, confidential friend, and legal adviser, and was applied to for advice on this occasion; *Held* that the grantor was not prevented from applying to a court of equity to enforce the performance of a parol agreement by the grantee, to reconvey the premises, although the object and intention of the grantor, in making the conveyance, was to place his property beyond the reach of his creditors; and the conveyance was in fact fraudulent as against such creditors. *ib*
6. *Held also*, that the grantee, although not in fact a licensed attorney, but only practicing as counsel in justices' courts, was in principle clearly within the rule applicable to attorneys. *ib*

PARTIES.

1. When an action is duly commenced against commissioners for loaning certain moneys of the United States, under the act of April 4, 1837, it is in effect brought against the state, and not against the commissioners personally. *Plumtree v. Dratt*, 333
2. It is therefore absolutely necessary to bring the state before the court, as a party, in the form prescribed by the statute, to enable the court to give any relief to the plaintiff. *ib*
3. If the complaint describes the defendants as "Commissioners of loans of the county of W." the addition to their names will be considered as merely *descriptio personarum*, and the action will not be deemed as brought against them in their official character as commissioners under the act mentioned. *ib*
4. And if the objection is distinctly taken by demurrer, the plaintiff cannot be allowed to proceed in his action, but must amend. *ib*

PARTNERSHIP.

1. Where A., in pursuance of a parol authority from B. purchases stock

in his own name, on the joint account of himself and B., the latter becomes the owner of one half of the stock, and liable to pay A. the amount advanced therefor. *Stover v. Flack*, 162

2. No written assignment of the stock from A. to B. is necessary to render B. liable for his proportionate share of the purchase money. *ib*
3. Where A. buys and pays for stock at B.'s request, on joint account, under an agreement that B. shall pay him for the moneys advanced, A. holding the stock, in the mean time as a pledge for repayment, with a right to expose it for sale in the market, if upon notice B. refuses to pay for it, A. is not bound to sell the stock in market, if it be worthless, before commencing a suit against B. to recover the amount advanced on the purchase. Such an agreement, though by parol, is not void by the statute of frauds. *ib*

4. A division by partners, of the co-partnership assets between themselves, and the transfer of such assets by the individual partners in payment of their private debts, when the partnership is insolvent, is in point of law a fraud upon the creditors of the partnership. *Ransom v. Van Deventer*, 307

5. Such a transfer of the partnership effects is invalid, as against the creditors of the firm, and the property remains partnership property until it comes to the hands of a *bona fide* purchaser for a valuable and new consideration. *ib*

6. If the person to whom the property is transferred has notice that it is partnership property, and he takes it in payment of a precedent debt, he will not be deemed a *bona fide* purchaser. *ib*

See TRUST AND TRUSTEE.

PAYMENT.

See MORTGAGE, 1.

PENALTY.

See AGREEMENT, 14.

PERSONAL INJURIES.

See EVIDENCE, 2.

PLEADING.

See COMPLAINT.

PRACTICE.

1. Where a defendant, residing in Canada, was inveigled into this state by a trick, for the purpose of effecting a service of the summons upon him, the service of the summons and all proceedings dependent thereon, were set aside, and a warrant of attachment vacated. *Metcalf v. Clark,* 45
2. Whether or not the evidence on one side tends to establish a particular fact, is a question of law for the court; while its weight, and convincing force, are questions for the jury. *Tuttle v. Buck,* 417
3. An exception will always lie to an erroneous charge or ruling as to the legal tendency of the evidence. *ib*
4. Section 824 of the code applies as well to injunction orders as to other orders. The special provision made by section 225 is in addition to the powers conferred by section 824, and is not a substitute for them. *Peck v. Yorks,* 547
5. Hence, a judge of this court, or a county judge, has power, on an *ex parte* application, to vacate or modify an injunction order made by himself, without notice. *ib*
6. But this power is not to be used under all circumstances, without regard to the rights of parties to be affected thereby; nor should it be left to each judge to determine for himself under what circumstances he will exercise it. *ib*
7. A judge should never vacate or modify an injunction order, without notice, except when, from the urgency of the case, it is necessary to guard against serious loss which

sometimes may be occasioned by the delay incident to serving notice. *ib*

8. Where the application to modify an injunction order was not made till more than a year had elapsed after service of the injunction upon the defendants, or some of them, and not till after all of them, except one, had appeared and answered, *it was held* that an *ex parte* order modifying the injunction, without notice, was improvidently granted. *ib*
9. Upon an application for an order that the service of a summons may be made by publication, pursuant to the provisions of section 135 of the code, the applicant must not only show that the case falls within some one of the five subdivisions of that section, but he must also establish the jurisdictional fact that the person on whom the service of the summons is to be made cannot, *after due diligence, be found* within the state. *Peck v. Cook,* 549
10. The circumstance that such person is a non-resident is of no importance, except as it tends to establish the fact that he is not within the state at the time when the application is made. *ib*
11. If the affidavit upon which an order for publication is granted is insufficient, the plaintiff will not be aided by the fact that after the order for publication was made, the summons and complaint were served upon the defendant, personally, out of this state. *ib*

See FRAUDULENT REPRESENTATIONS.
REVIVOR OF SUIT.

PRINCIPAL AND AGENT.

1. An agent, who is commissioned by his principal to purchase a certain specific amount of property, is a special agent, and can no more purchase a smaller than a larger quantity of what he is commissioned to purchase. *Olyphant v. McNair,* 446
2. Thus where McN. authorized M. to purchase, for him, five hundred shares of the capital stock of a mining company, and M. purchased

one hundred shares, only; *Held* that McN. was not bound to refund to M. the sum advanced. *ib*

3. Though there may be cases where the purchase of a smaller quantity than that ordered would be deemed valid, as an execution of the authority *pro tanto*, yet such cases can only occur where an express or implied *discretion* was committed to the agent, in the exercise of his authority. *ib*

4. If the power of making and indorsing promissory notes for and in the name of a corporation is not expressly conferred upon its agent and attorney, by the instrument by which he is appointed, general words, at the conclusion thereof, authorizing him "to do all other acts and things for and in behalf of the said company that he may deem proper to further and protect its interests," cannot have that effect. SUTHERLAND, J. dissented. *Lawrence v. Gebhard*, 575

5. Proof that the agent of a corporation is in the habit of giving notes for the company is inadmissible, unless accompanied by proof that the company had some knowledge that the agent was in the practice of giving notes in its name. *ib*

6. The fact that such agent is a director gives him no authority, except when acting as a member of the board; unless there is some by-law conferring power upon him. *ib*

See INSURANCE, (FIRE,) 9, 12 to 16.
PROMISSORY NOTES, 3, 4, 5.

PRIVILEGED COMMUNICATIONS.

See EVIDENCE, 3.

PROMISSORY NOTES.

1. An agreement by an insurance company to allow five per cent on the whole amount of notes given for advanced premiums to be written against, without deduction for such sums as may be written against, is illegal, and the note cannot be recovered on, by the

company. But as the statute does not make the note void, a third person, receiving it before it became due, for a valuable consideration and without notice of the illegal agreement, will be entitled to recover. SUTHERLAND, P. J. dissented. *Cheabrough v. Wright*, 28

2. But merely receiving a note in part payment of a precedent debt, does not constitute a parting with value, which will render the holder a *bona fide* holder for value. *ib*

3. For the purposes of protest, a collecting agent occupies the position and is held to the obligations of a holder of commercial paper. *State Bank of Troy v. Bank of the Capitol*, 343

4. In the case of a bill or note, sent to a bank as agent for collection merely, in the absence of proof of an express contract or of commercial usage, it is not obligatory on the collecting bank to notify and duly charge *all* the prior parties to the paper, but only its own principal, or immediate indorser. *ib*

5. If the collecting bank undertakes to transmit notices of protest to other parties besides its immediate indorser, although this may be *some* evidence of an agreement to notify all the indorsers, it is not *sufficient* evidence of such an agreement, in the absence of proof of custom or usage. *ib*

6. Where a blank space is left, in a promissory note, after the word "at," in the place where the place of payment is usually mentioned, the holder of the note is authorized, by an implied authority, to fill the blank. *Kitchen v. Place*, 465

7. The word "at" implies that the blank space which succeeds it may be filled before the note is delivered, with a designated place of payment. And if the holder fills in a place of payment it will not discharge the indorser. *ib*

See ACTION, 1, 2.

AGREEMENT, 1, 5, 6.

BANKS, 1, 2.

PRINCIPAL AND AGENT, 4, 5, 6.

R

RAIL ROAD COMPANIES.

1. Where the general rail road laws of Ohio declared that any rail road company might, by means of subscription to the capital stock of any other company, or otherwise, aid such company in the construction of its railroad, for the purpose of forming a connection between said last mentioned road and the road owned by the company furnishing such aid; and authorized any two or more rail road companies, whose lines were connected, to enter into any arrangement for their common benefit; *Held* that these provisions gave the power to companies whose lines of road were connected to enter into an arrangement with each other for the purpose of securing a uniform gauge of the connecting roads, and to make it a part of such arrangement that one or more of the companies should guaranty the payment of the interest coupons issued by another. *Connecticut Mutual Life Ins. Co. v. The Cleveland &c. Rail Road Co.* 9
2. If the guarantors, under such circumstances, have the general power to make the guaranty, it is immaterial as between third parties without notice and such guarantors, whether their acts are authorized or ratified by a vote of the stockholders, in accordance with the provisos of the general rail road statutes of Ohio; those provisos being intended for the protection of the shareholders, and relating rather to the mode or manner of the execution of the power. *ib*
3. Holders of the coupons guaranteed have a right to presume that the guarantors have done their duty and have proceeded regularly, in the execution of the power. *ib*
4. Third parties dealing with a corporation are bound to know the law; that is, they are bound to take notice of the extent of its powers; but they have a right to assume, in the absence of any thing suggesting inquiry, that it has proceeded regularly in the execution of its powers. *Per SUTHERLAND, P. J.* *ib*

5. It being quite evident that when a cartman's cart and a railway car are progressing side by side in the same direction, with a space of sixteen or twenty-four inches between them, there can be no collision if each adheres to the track which the law assigns to it, in case a collision does occur, the presumption of negligence is altogether against the driver of the cart, and not against the conductor of the railway car; the former being able to deviate and depart from his track, which the latter cannot do. *Suydam v. The Grand Street and Newtown Rail Road Co.* 875
6. In an action against the railway company, to recover damages for injuries occasioned by the collision, the plaintiff must show that the collision proceeded exclusively from the negligent acts of the defendant, and not from his own negligent acts, or his own negligent acts combined with those of the defendant. *ib*
7. Where it appeared from the evidence, in such an action, that the collision was caused by the imprudent act of the plaintiff in pulling his horse to the left; *Held* that it could not be said he was without fault and did not contribute largely to bring about the collision resulting in his injury; and that the jury should have found a verdict for the defendant. *ib*

See BOND.
GUARANTY.

RELATION.

1. The doctrine of *relation* being a fiction of law, is to be resorted to only for the advancement of justice; and has not been adopted as a rule when third persons who are not parties or privies might be prejudiced thereby. *Per POTTER, J. Pierce v. Hall,* 142
2. Whether the comptroller's deed of land sold for taxes, vests the title in the purchaser, by relation back to the time when the sale became absolute, so as to entitle him, as against a trespasser, to repossess himself of any property tortiously severed from the freehold? *Quere.* *ib*

REPLEVIN.

Where the interest of a party entitled to the possession of personal property is of a limited nature less than the actual value of the property replevied, the jury, in an action of replevin between the actual owner and the party entitled to the possession, should be directed to assess the value of the property, only at a sum which will be equivalent to the limited interest of the defendant, therein. *Rhoads v. Woods*, 471

REVIVOR OF SUIT.

1. Prior to the code there were known in the equity practice two modes of proceeding to revive a suit; one under the revised statutes, in the cases provided for by it, by summary application founded on petition or affidavit; and one by filing a bill of revivor. *Matter of Bornsdorff v. Lord*, 211
2. The revivor on motion, under section 121 of the code, although it has a wider range as to the cases in which it is applicable and necessary, and has a more limited period within which the motion can be made, still, in effect, stands in the place of the summary application, and the supplemental complaint stands in the place of a bill of revivor. *ib*
3. And as under the former practice it was not necessary to obtain from the court leave to file a bill of revivor, so it is now unnecessary to apply to the court, by motion, for leave to continue the action against the executor of a deceased defendant, by filing a supplemental complaint; although more than a year has elapsed since the death of the party. *CLERKE, J. dissented.* *ib*

S

SALE.

See EVIDENCE, 4, 5, 6, 8.

SCHOOL COMMISSIONER.

See OFFICE AND OFFICER.

SHEEP.

See ACTION, 4.

SHERIFF.

1. A sheriff acquires a lien upon property levied on by him under attachments, which constitutes a qualified or special title. *Rhoads v. Woods*, 471
2. He is thereby authorized to take and hold possession until the demands for which the attachments were issued are paid, or until judgment and a sale of the property seized. *ib*
3. The assertion of that title, against a wrongdoer, here by a foreign sheriff, cannot be considered as an attempt to execute the process of another state within our borders. *ib*
4. The title of a foreign assignee in bankruptcy, or in *sequestration*, to personal property, is admitted here, as against the bankrupt or insolvent, and the same principles are applicable here to support the special title of a sheriff, acquired under the process and laws of another state, as against any wrongdoer, or against the defendant in the process under which the sheriff seized the property. *ib*
5. If property levied on under an attachment is taken out of the hands of the sheriff, a reasonable sum for the expenses of regaining the possession will follow the lien of the sheriff, as an incident to the performance of his duty, and to that extent he may insist upon being repaid, if he acquires possession in a lawful manner. *ib*
6. Neither a judgment creditor nor an officer is justified in using the process or authority of the court oppressively, to the injury either of the debtor or of any third person. *Cantine v. Clark*, 629
7. A party who directs, and the officer who makes, an oppressive levy, is responsible for the unlawful act. As regards the officer, the rule is that where a ministerial officer does any thing contrary to the duty of his office, and damage thereby accrues, an action lies. *ib*

8. Although there be no actual corruption or intentional fraud on the part of the sheriff, yet if he abuse his trust he is answerable to the law. *ib*

See EXECUTION, 3, 4, 5.

SLANDER OF TITLE.

1. An action lies for slander of the plaintiff's title to personal property. To maintain such an action the plaintiff must establish, 1. That the words were false; 2. That they caused an injury to him in reference to his title to the property; 3. That they were uttered maliciously, and in order to injure the plaintiff. *Like v. McKinstry*, 186
2. The plaintiff and defendant made a parol agreement, by which the former hired the farm of the latter, for one year from the 1st of April, 1861, with the privilege of sowing the farm to rye in the fall of 1861, and reaping the crop; the plaintiff to have the use of the barn and press, on the farm, to press the straw &c. The plaintiff sowed rye on the farm, in the fall of 1861, with the assent and assistance of the defendant. *Held* that the lease originally made was only legal and valid for one year from its commencement; but that the defendant, by assenting to, and assisting in, the sowing of the rye in the fall, sanctioned the stipulations in the lease, for the sowing and reaping of the crop, and virtually made a new agreement with the plaintiff, conceding the use of the farm for such further period as was requisite. *ib*
3. *Held, also*, that such new agreement was valid, and founded on a sufficient consideration, and gave to the plaintiff a good title to the rye, and the right to maintain an action for slander of his title. *ib*

SPECIFIC PERFORMANCE.

1. A party who is entitled to a specific performance of an agreement to release his land from the lien of a mortgage may maintain a suit in equity for that purpose, notwithstanding he has, before the filing of his bill, conveyed away the land by deed with warranty. *Bennett v. Abrams*, 619

2. Form of a judgment or decree for the specific performance of an agreement to satisfy and discharge a mortgage which is a lien upon the plaintiff's land, where no damage has yet been sustained by the plaintiff, and the mortgage is held by a third person, not a party to the action, and is not yet due. *ib*

3. If specific performance be impracticable, then the party may have approximate relief in some other form which will secure to him the substantial advantages of his contract. *ib*

4. County courts have jurisdiction of actions for the specific performance of contracts. *Williston v. Williston*, 685

5. As a general rule, to entitle a party to ask the interposition of a court of equity to enforce the specific performance of a contract, the contract must be supported by what courts of equity deem a meritorious consideration. *ib*

6. If the inadequacy of consideration be so great as to render the bargain hard or unconscionable, the court may refuse its aid to enforce the contract, and leave the parties to contest their rights at law. *ib*

7. Where G. W. the owner of premises consisting of a house and about an acre of land situated in the country, not worth over \$75, on agreeing to convey the same to his brother C. W., if he would come and live with him, obtained from the latter an undertaking that he would perpetually maintain the division fences between the lot and G. W.'s farm, being three sides of the lot—a promise which was scrupulously fulfilled for more than twenty years—and on the strength of such agreement to convey to him, C. W., had made valuable improvements upon the premises; *Held* that so far from the bargain being hard and unconscionable on the part of C. W. it would be a hard rule that would pronounce the consideration grossly inadequate; and that it would be unconscionable to deprive him not only of the land but of the fruit of his labor, and of the enjoyment of his improvements. *ib*

8. In equity time is not, ordinarily, of the essence of a contract respecting real estate. It may, under certain circumstances, be made, or become so; but the general rule is that if a party has not been guilty of gross neglect; if his delay can be reasonably explained, and is consistent with good faith; and time has not been made material by the agreement of the parties, a court of equity will afford relief notwithstanding the delay. *ib*

9. It is always sufficient for a party to show that his laches has arisen from a reasonable cause, or has been acquiesced in by the other party. *ib*

10. A parol agreement for the conveyance of land will, if partly executed by the party seeking relief, be specifically enforced. *ib*

11. Where a purchaser takes possession of lands, under a parol agreement of the vendor to convey, a court of equity will decree a specific performance; especially if improvements have been made by the vendee, on the faith of the agreement. *ib*

STATE.

See PARTIES, 1, 2.

STREETS.

See HIGHWAYS.

MUNICIPAL CORPORATIONS.

STOCK.

See FRAUDULENT REPRESENTATIONS.

PARTNERSHIP, 1, 2, 3.

PRINCIPAL AND AGENT, 1, 2, 3.

SUMMONS.

Service by publication—See PRACTICE, 9, 10, 11.

Setting aside—See EXECUTORS AND ADMINISTRATORS, 3. PRACTICE, 11.

SURROGATE.

1. A recovery in the supreme court, against an administrator, after a

trial at law on the merits, for services rendered by the plaintiff as proctor and counsel for the administrator, in the administration of the estate, adjudges that such services constituted actual, necessary, just and reasonable expenses of the administration, which must be borne by the estate. And the surrogate has power to order the administrator to pay the amount of the judgment, although there are not sufficient assets to pay the same and all the debts of the intestate which constitute claims against his estate, in full. SUTHERLAND, J. dissented. *Matter of the estate of Thompson*, 237

2. The surrogate has the same power to direct that an execution be issued upon a judgment recovered against an administrator for liabilities incurred by him in the administration of the estate, as he has to order such process to issue upon a judgment recovered for a debt owing by the deceased. And it is his duty so to order, if the creditor shall require it. *ib*

3. The legislature, by repealing the provisions of the revised statutes, declaring that no surrogate shall, "under any pretext of incidental power or constructive authority, exercise any jurisdiction whatever, not expressly given by some statute of this state," intended that a surrogate should have the incidental power to open or correct a decree made through fraud or a mistake as to a material fact. *Dobbs v. McClaran*, 491

4. Hence if the surrogate believes a motion to open a previous decree, declaring that a will was not duly executed and attested, is made in good faith, and that it is reasonably probable, from the papers on both sides, that such decree was made under a mistake as to what the witnesses to the will had in fact sworn to, or that the witnesses, from not understanding the questions put to them, omitted to state facts material to show the due execution of the will, he has power to grant the motion, as incident to his statutory power to take the proofs as to the execution of a will and to admit the same to probate, or otherwise. *ib*

T

TELEGRAPH.

1. Where parties have agreed that their communications with each other shall be made by telegraph, this in effect is a warranty by each party that his communications to the other shall be received. *Trever v. Wood*, 255
2. A communication by telegraph is only initiated when it is delivered to the telegraphic operator. It is completed when it comes to the possession of the party for whom it is designed. *ib*
3. The rule that has been established by the courts, in respect to contracts made by letter sent through the mail, is not applicable to communications by telegraph. *ib*
4. Telegraph companies, while conducted by private enterprise, cannot be so clothed with a public official character as to make the receipt of a communication at the office of the company of the same effect, in regard to the acceptance of an offer by a contracting party, as the actual delivery of it would have. *ib*
5. The telegraph company is the agent of the employer, while the post office is conducted by public authority and is not the agent of any person. *ib*

TENDER.

1. S. sold a canal boat to H. for \$2400, a part of which was paid down, and the balance was secured by the promissory notes of H. payable at future periods. H. was to have possession of the boat, but the title was to remain in S. until the notes were paid. In April, 1860, some of the payments due from H. being in arrear, S. directed the boat to be sold at auction. He had previously waived the technical forfeiture arising from failure to pay at the day, by accepting a payment from H. and by treating him as a purchaser still holding under his contract. Previous to the sale H. tendered to S. the amount due up-

on the contract. *Held* that such tender was equivalent to performance by H., and the effect of it was to take away from S. the right to proceed and sell the boat as upon a forfeiture, and to put H. in the position he occupied before any forfeiture could be claimed. *Hutchings v. Munger*, 896

2. *Held also*, that S. occupied substantially the position of a mortgagee or pawnee of the property, and upon H.'s failure to pay, he had a right to resume possession and sell the property—a right equivalent to that of foreclosure by a mortgagee, or sale by a pawnee; but that right could be defeated by performance, or an offer and tender of performance, before or after the stipulated day; such a tender standing in the place of, and being equivalent to, performance. *ib*
3. *Held further*, that H. was by his tender, remitted to his original rights, and entitled to the possession of the boat, in the same manner that he would have been upon an actual performance. And that the sale of the boat by S. was improper, and the dispossession of H. illegal. *ib*

TRUSTS AND TRUSTEES.

Where one partner subscribes for stock for the benefit of both, signing his name individually, and not as trustee, he is not a trustee within the provisions of the general act of 1848, relative to the formation of corporations, &c. (*Laws of 1848, ch. 40, §§ 16, 24.*) *Stover v. Fish*, 162

U

UNDERTAKING.

See APPEAL, 2, 8, 4.

UNITED STATES COURTS.

See CONSTITUTIONAL LAW.

USURY.

1. Nothing short of a corrupt and illegal contract in violation of the statute will constitute usury. It must be a contract or agreement for the loan or forbearance of money, goods or things in action, by which illegal interest is reserved and taken, or agreed to be reserved or taken. Otherwise usury does not exist. *Lesley v. Johnson*, 859
2. The reservation of illegal interest, or the taking or agreeing to take unlawful interest, must enter into or become part and parcel of the contract, in order to bring the transaction within the prohibition of the statute. *ib*
3. When a contract for the loan of money, legal and innocent in itself, is once made and consummated, it cannot be made usurious and illegal by any subsequent transactions of the parties. *ib*
4. Though subsequent transactions may of themselves be illegal, and forbidden by law, they cannot impart the taint and the consequences of usury to an antecedent agreement, fair and just and upright in itself. *ib*
5. If the obligation under the agreement is to pay a debt, the obligation, with the legal rights resulting from it, remain in all their force, and cannot be discharged by engrafting upon it a subsequent agreement obnoxious to the charge of usury. *ib*
6. If the subsequent agreement has the effect to annul and rescind the previous agreement, a different rule will prevail. *ib*
7. Where subsequent to the execution of a bond and mortgage, the mortgagors made an agreement with B. that if he would pay the money due thereon, to the holder of the mortgage, take an assignment thereof, and execute a covenant extending the time of payment, they would pay him a bonus of \$4355.56, which was acceded to by B. and was carried into effect by both parties; *Held* that the subsequent usurious agreement did not taint the

mortgage with usury, or constitute a defense to an action to foreclose the same, brought by an innocent purchaser thereof. *ib*

See HUSBAND AND WIFE, 14, 15.

LIMITATIONS, STATUTE OF, 9, 10, 11.

V

VENDOR AND PURCHASER.

1. After the vendee in an executory contract has perfected his title to lands in pursuance of it, an action of ejectment will not lie against him by a grantee of the sheriff by deed under a judgment against the devisee of the vendor, docketed subsequent to such contract, though such judgment was docketed while a portion of the purchase money remained unpaid, and before the vendee received his deed. *Smith v. Gage*, 60
2. Before a purchaser can set up, as a defense to an action on a note given as collateral security for an installment of the purchase money, the inability of the vendor to give a good title to a portion of the premises, he must surrender the possession of the premises. *R. D. Smith, J. dissented. Lewis v. McMillen*, 420
3. The fact that a vendor, though he has a perfect title to four-fifths of the premises contracted to be sold, has not a perfect title evidenced by a written conveyance, for one-fifth, although it may afford a reason for rescinding the contract by the purchaser, yet it can furnish no ground for his refusing all payment, without rescinding. *ib*
4. The purchaser will be compelled either to affirm, or to disaffirm and rescind, the contract, *in toto*. He will not be allowed to affirm so much of the contract as is advantageous to himself, and enjoy all its benefits, and disaffirm and reject that which is burdensome. *ib*
5. It cannot be pretended that a purchaser has rescinded the contract,

so long as he holds the possession of the premises, under it. He must rescind by acts as well as words, or it is no rescission. *ib*

6. Where the action is not upon the contract of sale, nor between the parties to it, but upon a separate and independent promise by the purchaser and other parties, to pay the vendor the sum specified, at a particular day, before the defendants can defeat the action entirely, they must show either fraud in the transaction in which the note had its inception, or an entire want, or failure, of consideration. A partial want, or failure, of consideration cannot be alleged in bar. *ib*

7. Even if the vendors refuse to convey, if the contract is still executory on their part, such refusal is no bar to an action upon a separate note, given to secure one or more of the payments. The party must pay his note, and take his remedy upon the contract, to recover his damages for the breach. *Per JOHNSON, J.* *ib*

8. Parties signing such note as mere sureties for the purchaser, having no interest in the contract, cannot set up the breach of such contract as a defense against an action upon their promise. Their remedy is against their principal, for any sum they may be compelled to pay on the note. *ib*

9. Where the contract of sale in express terms makes the payment of the purchase money a condition precedent to the right of the purchaser to a conveyance, and in addition to this the purchaser gives his note for one of the payments, and procures other persons to sign it jointly with him, this puts the intention to make the note in the nature of an independent, promise, or a condition precedent beyond all doubt. *ib*

See COMPTROLLER'S SALE.
WILL, 5, 6.

VENIRE.

See JUSTICES' COURTS, 9, 10.

W

WARRANTY.

See EVIDENCE, 6.

WILL.

1. General rules of construction.

1. Under the provisions of the revised statutes a will, whether it disposes of real or personal property, speaks as of the time of the testator's death. *McNaughton v. McNaughton*, 50

2. Where a testator devises all his real estate, in express and unambiguous words, he will be deemed to have reference to the real estate as it shall exist at the time of his death. *ib*

3. Although the introductory clause of a will, declaring the testator's intention to dispose of all his "estate" does not, of itself, enlarge a particular devise to a fee, yet it is very material to the inquiry concerning the purpose of the testator in relation to the quantum of the estate devised. *Charter v. Otis*, 525

4. It is a key to the intention of the testator; and if it shows that he intended to part with his whole interest, the subsequent words will, if possible, be so construed as to pass an estate in fee, to prevent intestacy as to any part of his property. *ib*

2. Construction and effect in particular cases.

See McNaughton v. McNaughton, 50.
Smith v. Gage, 60.
Charter v. Otis, 525.

3. Revocation of.

5. G., being the owner of a farm, and certain personal property, made his will, giving and bequeathing to his wife all his personal estate. He then gave, devised and bequeathed to his wife "all his real estate" during her life, remainder over to others. He subsequently sold and conveyed the farm to L., taking back from the grantee a bond and mortgage for a part of the purchase

money, which he held at the time of his death. *Held* that the bond and mortgage passed to the widow of the testator, as part of the personalty; it being the intent of the testator that the devise should operate only on the real estate of which he should die seised. *McNaughton v. McNaughton*, 50

6. *Held*, also, that if the devise were to be regarded as a devise of the farm—in effect a specific devise—then the sale and conveyance was, to that extent, a revocation of the will. *ib*

4. *Lost or destroyed wills, proceedings to establish.*

7. Practice, and rules of evidence, upon a proceeding under the statute, to establish the execution and validity of a will alleged to be lost or destroyed; and what will be deemed sufficient proof of the execution, and the provisions, of the will. *Everitt v. Everitt*, 385

8. The proof of a lost or destroyed will proceeds upon the theory that it is not in existence and cannot be produced before the surrogate. Hence the case is one of secondary evidence exclusively. *ib*

9. Proof will also be received to supply the imperfection of memory of the subscribing witnesses. *ib*

10. A proceeding under the statute, to prove a lost will, is not within the spirit or the letter of the 52d section of the statute of limitations applicable to suits in equity, requiring bills for relief, in case of the existence of a trust not cognizable by the courts of common law &c. to be filed within ten years after the cause of action shall accrue. *ib*

WITNESS.

1. The exclusion of the testimony of a party in his own behalf, in respect

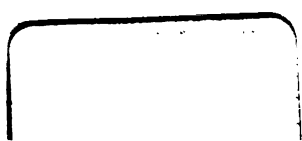
to a transaction between him and a deceased person, against the executors of the latter, specified in section 899 of the code, extends only to evidence of that character when offered against a party who has acquired title to the cause of action immediately from such deceased person, and not where the party has acquired such title from the decedent mediately or remotely. In all other cases parties are competent to testify to such facts, as much as to any other. *Prouty v. Eaton*, 409

2. Thus where the plaintiff in a foreclosure suit, though originally the immediate assignee of the deceased mortgagee, had assigned the mortgage to other persons, viz. the executors of the mortgagee; *Held* that he was by that assignment wholly divested of all title; and that upon the executors re-assigning the mortgage to him, his title was then derived immediately and entirely from them, and from no other person; and he stood as though he had never had any title, other than that derived from the executors; the re-assignment not restoring him to his original condition of immediate assignee of the deceased mortgagee. *ib*

3. It was always competent to prove the loss or destruction of a paper, for the purpose of admitting parol evidence of its contents, by the party himself; and there is no provision of the code that operates to the exclusion of a party from thus testifying. *Williston v. Williston*, 685

4. A plaintiff, in an action against executors, is a competent witness to prove the contents of a lost letter. Section 899 of the code of procedure was intended to provide for the case of personal intercourse, conversations or communications had personally with the deceased, and is not applicable to testimony resting in papers or documents of any description. *ib*

See MALICIOUS PROSECUTION, 4.





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